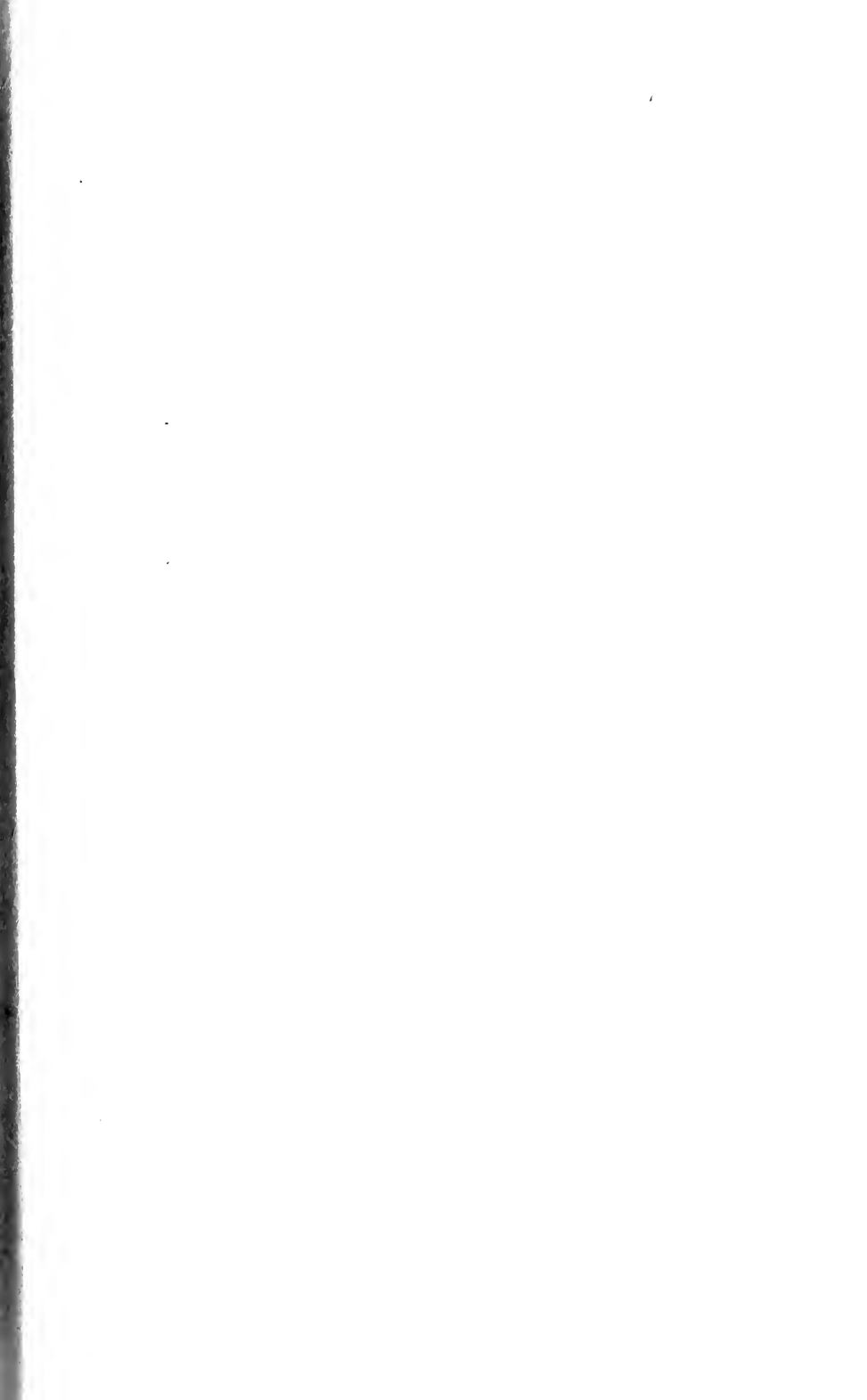




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A TREATISE OF THE LAW
OF
MUNICIPAL BONDS
OF THE
MUNICIPAL CORPORATIONS
OF THE
UNITED STATES

INCLUDING BONDS ISSUED TO AID RAILROADS, TO WHICH
ARE ADDED EXCERPTS FROM THE STATE CONSTITUTIONS
RELATING TO THE INCURRING
OF DEBT FOR PUBLIC PURPOSES

BY
T. C. SIMONTON
⁽¹⁾
Of the New York and New Jersey Bar

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PREFACE.

THE author having been for a number of years past corporation counsel for a large city near New York, and having had occasion, as such, to consult the laws in reference to Municipal Bonds, and finding no work entirely devoted to the subject had been written, although the subject is treated at considerable length by several eminent writers upon Municipal Corporations, began to collect references on the subject, and to investigate the principles of the law as applied to such bonds, with a view later to put the same in book form. This volume is the result of the work so begun.

The author has not attempted to collate the statutes of the States pursuant to which bonds are issued, because it is impossible to do so in a single volume, and if practicable, the Legislatures of the various States, meeting for the most part each year, add to, and amend, the existing statutes to so great a degree, that a collation of the statutes relating to municipal bonds would be but temporarily a full one.

The author has sought to embrace all the principles of the law relating to municipal bonds from the introduction of a statute authorizing their issue to their final payment either voluntarily or enforced by suit.

It is to be hoped that the work will be of use to the profession in general, and to that necessary, and at the present time much abused, class of men, the Bankers and Brokers, without whose aid Municipal Bonds would not be so readily sold, or, if sold, not at so good a price to the corporation issuing them, although the contrary is the view of those who are not familiar with the subject.

T. C. S.

NEW YORK CITY, *October 1st*, 1896.



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MUNICIPAL BONDS.

CHAPTER I.

INTRODUCTION.

SECTION.

- 1—Scope of work.
- 2—Term “Municipal corporation” defined.
- 3—Municipal corporations, how created — *Quasi*-corpora-

SECTION.

- tions—Cannot be attacked collaterally — Towns — Villages — School districts — Their powers.
- 4—Municipal Bond—Its purpose.

§ 1. This work is intended to treat of the right of all municipalities or subdivisions of the State, be they counties, cities, towns, villages, boroughs, townships, school districts or precincts,¹ to issue and place on the market their negotiable bonds, and of all the proceedings relative to the issue, sale and disposal thereof, and all matters connected therewith, together with the rights of the holders of such paper.

¹ A precinct or a strip of land, as a strip extending so many miles on each side of a railroad, may be authorized to aid a railroad, and to grant such aid either by raising the money by taxation upon the land within the precinct or strip (*Ogden v. County of Davies*, 102 U. S. 634; *Deland v. Platt Co.*, 54 Fed. R. 823), or by issuing bonds, which are to be paid ultimately by a tax to be levied by the county authorities specially upon such land. *Breckenridge Co. v. McCracken*, 61 F. R. 191.

The bonds are issued in the first instance by the county authorities, and the suit to enforce their collection is brought against the county.

(This is in cases where the precinct or strip is not a corporation.) As the court in one case said: “While the district subscribing is the debtor, yet, in form, the county is the obligor, through the county the indebted district is to act, and through the same agency the indebted district is to be coerced by the assessment of the tax essential to meet its obligations. Such a district becomes for the purpose of the subscription a corporation *quoad hoc*.” *Breckenridge Co. v. McCracken*, *supra*. This case enters very fully into the subject of such bonds and the mode of enforcing their payment. See also *Blair v. Cumming Co.*, 111 U. S. 363.

§ 2. The term "Municipal Corporation," when used in this work, is intended to include any subdivision of the State established by law to assist in the government thereof, be the purpose for general local government, as cities, towns, boroughs and villages, or special, as counties which are created principally to aid the State in the administration of the laws and school districts, which are created for the sole purpose of furthering the educational interest in designated localities.

While as indicated above the term "Municipal Corporation," when used in this work, is intended to include all the political subdivisions of a State, it must not be understood that we mean that all subdivisions of a State are recognized as municipal corporations proper. In many of the States, counties¹ are not recognized as embraced under the term, and a town² or school district³ in others is not included in the term. Therefore when the term "Municipal Corporation" is found in a State constitution or in a statute whether it shall be deemed to include all or a part of the political subdivisions of a state depends upon the construction of the term as defined by the respective State courts.

§ 3. **Municipalities, how created—Quasi-corporations.**—A municipal corporation *proper* is a public corporation having a charter of incorporation, which charter was obtained from the Legislature. It was the practice to incorporate municipal corporations by special charter, and almost all the older municipal corporations are so incorporated, and this method may still be pursued, unless prohibited by the State constitution.⁴ In recent years the more common practice is to pass a general act for their incorporation. Often this act divides the corporations into classes, the basis of the division

¹ 15 Am. & Eng. Ency. of Laws, 553; 4 Am. & Eng. Ency. of Laws, 343; Tiedeman on Mun. Corp. § 3.

² Wisconsin, *Eaton v. Supervisors*, etc., 44 Wis. 489.

³ Missouri, *Heller v. Stremmel*, 50 Mo. 309; Wisconsin, *Eaton v. Supervisors* etc., *supra*.

⁴ The constitutions of Illinois, Kansas, Indiana, Iowa, California, Arkansas, Florida, Wisconsin, Ohio, Virginia, Tennessee and West Virginia now contain such prohibitions. New Jersey only upon notice. Sec. vii. § 9.

usually being the number of inhabitants. Under these acts the inhabitants of any portion of the State may become incorporated by their voluntary organization, upon compliance with the conditions and terms marked out as necessary to be pursued by the general act in order that any portion of the State may become a corporate body for political and local purposes.¹

Under these general laws the municipal corporations are voluntary organizations, incorporated for local conveniences and necessities. Under the method of incorporating municipal corporations by special charter their organization was not always voluntary, because the Legislature possessed the power to incorporate the municipality against the express wish of the inhabitants of the locality incorporated, unless restrained by the constitution of the State.²

Cities always are, and towns, boroughs and villages³ usually are regarded as municipal corporations *proper*, if they are chartered corporations, and are created for the purpose of local public convenience and government.

Counties, while greater in extent of territory than municipal corporations proper, are regarded as *quasi*-corporations. Their organization is not voluntary. They are usually arbitrarily created by some general act of the Legislature which subdivides the State into counties and fixes their boundary lines. They are created

¹ See Dillon on Mun. Corp. Vol. I. (4th ed.) § 41, and the very elaborate note thereto.

² In Alabama, Colorado, Louisiana, Michigan, Minnesota, Maine, Maryland, Nevada, New York, North Carolina, Oregon and Texas, municipal corporations may be created by special charter.

³ City of Wahoo v. Reeder, 43 N. W. R. (Neb.) 1145; Eaton v. Supervisors, 44 Wis. 489.

In Massachusetts, at the first settlement of the colony, towns consisted of clusters of inhabitants dwelling near each other, which by effect of legislative acts designat-

ing them by name and conferring upon them certain powers, became in effect municipal or *quasi*-corporations without any formal act of incorporation, but soon after the adoption of the constitution it was first expressly enacted that towns should be corporations. Hill v. Boston, 122 Mass. 344.

Before the statute the courts recognized their existence as *quasi*-corporations, capable of holding property and making contracts for the purpose for which they were established. Windham v. Portland, 4 Mass. 384.

primarily for the purpose of assisting the State in the administration of justice, and in matters of education, of military organization, of travel and transportation,¹ "with scarcely any exception all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are, in fact, but a branch of the general administration of that policy."²

It is the charter of incorporation, either special or general, that distinguishes a municipal corporation from a *quasi*-corporation.³

Another important distinguishing feature is that the incorporation is for the distinct purpose of authorizing the inhabitants of the corporation to enact laws for their local internal concerns, matters in which the other people of the State have no interest.

The involuntary incorporation of counties and other *quasi*-corporations is also often alleged as a distinguishing feature,⁴ but, as we have seen, municipal corporations when organized under a special statute can be created against the wishes of the inhabitants,⁵ and without their assent, unless the constitution of the State forbids.

A municipal corporation is a political subdivision of a State, the territorial limits of which are defined, and the inhabitants thereof are clothed, as to special local matters, by legislative enactments with the power to govern themselves. This power is subordinate to the authority of the State, and is confined to the purpose of the incorporation, and also depends upon the necessities of each.

The larger municipal corporations are clothed with greater power of local government and upon more varied subjects than the smaller.

The municipal corporation is the people who reside

¹ Williamsport v. Com., 81 Pa. 487; Freeholders of Sussex Co. v. Strader, 18 N. J. L. 108; 15 Am. & Eng. Ency. of Law, 955.

² Hamilton Co. v. Mighels, 7 Ohio St. 109.

³ Tiedeman on Mun. Corp. § 3.

⁴ Hamilton Co. v. Mighels, 7 Ohio, 108.

⁵ Paterson v. S. U. M., 24 N. J. L. 385; State v. Babcock, 25 Neb. 709; People v. Morris, 13 Wend. (N. Y.) 335; State v. Curran, 12 Ark. 321.

therein, and the common council, or other legislative body, are but the agents of the corporation and not the corporation itself.¹

The charter prescribes the name of the corporate body, and usually provides that it may have and use a common seal, although this right is incident to every corporation, and a seal may be adopted and used without legislative authority, and any seal affixed with authority will bind the corporation, although it be not the adopted seal.²

The affairs of the municipal corporations are usually carried on by the officers selected by the inhabitants at regular annual elections held for that purpose, and the rights, powers and duties of the various corporations are to be found in the special charter or general laws incorporating them, and in the general and special acts relating to the particular class of municipalities of which they are a part.

The corporate existence of a municipal corporation cannot be attacked collaterally on a suit to enforce its bonds.³

A *de facto* corporation exercising the powers granted to a board legally organized is estopped to plead its illegality.⁴

When a municipal body has assumed under color of authority, and exercised for a considerable period of time, with the consent of the State, the power of a public corporation, of a kind recognized by the organic law, neither the corporation nor any private party can in private litigation question the legality of its existence.⁵

¹ *Lowber v. Mayor etc. of N. Y.*, 5 Abb. (N. Y.) Pr. 325; *Valparaiso v. Gardner*, 97 Ind. 1.

² Dill. on Mun. Corp. § 190.

³ Dill. on Mun. Corp. (4th ed.) § 43 a, 185 n., 418.

⁴ *Allen v. Cameron*, 3 Dill. 3 C. C. R. 198.

⁵ *Ashley v. Board*, 60 F. R. 55, 63; *County of Ralls v. Douglas*, 105 U. S. 728. The legislative recognition of a county illegally and fraudulently organized, gives validity to

its acts and dealing with third persons. *Com'rs v. Rose*, 140 U. S. 71. See also, *Cornell University v. Village of Maumee*, 68 F. R. 418, where the city issued bonds as a village, when it should have been termed a city, the bonds were held good and the corporation estopped to set up the fact as a defence.

Where the organization of a county was invalid, because it contained less than the number of square miles required by the con-

It is the province of the State to question by proper judicial proceedings, the incorporation; not that of a defendant in a private suit when it has asserted its corporate existence and incurred liability to innocent parties on the faith of it.¹

But it has been held that where the attempted organization is void, because of some act done or omitted, occurring in violation of the constitution or statute, which act done or omitted was declared essential to the very existence of the incorporation, that in such a case the body may plead the invalidity in a suit on its bonds.²

In this case the court said :

“ Such a rule would not, of course, apply to irregularly organized corporations, or those which obtained such validity by special grant of the State, or compliance with general laws as to be merely voidable organizations, and such as the State by direct proceeding could alone dissolve; but where the constitution or the statute provides that acts done or omissions occurring in efforts to organize a municipal corporation shall render the attempt to organize and the charter invalid and of no force whatever, it is not left to the court to disregard this statutory or constitutional prohibition at the instance of a creditor deceived by the appearance of an organization. First, is there a legal corporation; and second, has it power to issue the bonds proposed to be sold? He must at his peril determine both questions for himself.”

When a municipal corporation under an unconstitutional act has been held to be illegally incorporated by proper proceedings brought in the name of the State, usually by an information filed on behalf of the State, the bonds theretofore issued by the corporation are

stitution of Kansas, Art. 9, § 1, it was held that as the invalidity did not appear on the face of the act creating the county, it was a *de facto* county, and its bonds were valid. *Riley v. Township of Garfield*, 54 Kan. 163.

¹ *Montpelier v. Huron*, 62 F. R. 778.

² *Ruobs v. Town of Athens*, (Tenn. 1891) 18 S. W. R. 400. See also *Norton v. Shelby County*, 118 U. S. 425.

invalid. The Legislature would have to be resorted to in order to cure the defect.

The corporate existence of a municipal corporation is proved by either the original charter or an authenticated copy thereof, or a printed copy of the statute published by authority.

When this cannot be obtained, secondary evidence may be offered of its corporate existence, which latter consists of continued acts of corporate existence.¹

Although a county is usually not regarded as a municipal corporation *proper*, yet in some States it is regarded as such a corporation.²

Towns are also often regarded as *quasi*-corporations unless they have a charter.³

Townships are subdivisions of a county, created by statute and having power to enact local laws for local necessities. In some of the States their business is transacted by a township committee elected by the inhabitants, while in other the legal voters meet at certain stated or special times and vote upon the questions affecting the corporation.⁴

The decisions of the respective State courts must be consulted in order to ascertain what public corporations are embraced in the terms "town," "village," "township," "municipal corporation," when used in a statute authorizing the issue of bonds. It is impossible in a work of this kind to attempt to do so.

¹ See Dill. on Mun. Corp. § 84; Tiedeman on Mun. Corp. § 31.

² *Curry v. Dist. Tp. of Sioux City*, 62 Iowa, 102; *Dowland v. County of Sibley*, 33 Minn. 430.

³ In a number of the States the term "town" is held to include cities. In New Jersey, it is so held, but that such meaning may be excluded by a very slight indication of the lawmakers. *State v. Richards*, 42 N. J. L. 497. In New York it is held the term when used in a statute affecting the whole State may include cities. *Charity Com'rs v. McGurrian*, 6 Daly, 356.

In Wisconsin, the term, if not repugnant to any special statutory provision, may include a city, ward or district. *State v. Goldstuecher*, 40 Wis. 124. In Indiana the term has been held to include cities. *Flynn v. State*, 21 Ind. 286. See *State v. Craig*, 132 Ind. 54. In Minnesota the term has been held to include incorporated cities. *Odegard v. Albert Lea*, 33 Minn. 351.

⁴ For a full discussion of Towns and Townships, see 26 Am. & Eng. Ency. of Law, p. 98 *et seq.*

As said by an eminent writer on municipal law: "It is quite impossible in any brief space to convey an adequate idea of the exact nature and properties of an American Municipal Corporation.

"There is nothing in the law more complex or abstruse."¹

It may be said generally that all *quasi*-municipal corporations have no authority except that conferred upon them by statute. They are creatures of statute, and to the statutes resort must be had to ascertain their corporate authority to act. When found the same principles apply to the issue of bonds and other paper by them, as apply to the issue of such paper by municipal corporations *proper*, except that, as is elsewhere shown, the former corporations are not held to have the implied power to issue negotiable paper, unless the power so to do be express or they have the express power to borrow.²

School districts proper are organized under the general laws of the State for educational purposes only. Their extent of territory and authority depends upon the statute authorizing their incorporation, or some general or special law.³ In some of the States they have the power of levying taxes direct for their support, while in others they, while supported by tax, do not levy it directly, but ascertain the amount necessary for their current expenses for the fiscal year, and this amount is certified to the body charged with the duty of levying the taxes and is raised by the latter body.

The power of a school district to issue bonds for school purposes must be found in the statute under which they are organized or some general or special law, such power is not inherent in the district,⁴ but if the school district have power to borrow money, it may issue its negotiable bonds to evidence the same.⁵

¹ Dill. on Mun. Corp. (4th ed.) § 230; *State v. School Dist.*, 16 Neb. 180; *State v. Board of Co. Com'rs*,

² See §§ 30, 31, 32.

48 N. W. R. 46.

³ *Hotchkiss v. Plunkett*, 60 Conn. 230.

⁵ *Folsom v. School Directors*, 91 Ill. 404. See § 13.

⁴ *Hotchkiss v. Plunkett*, 60 Conn. 230.

These corporations are usually regarded as *quasi-municipal corporations*, rather than as municipal corporations *proper*.¹

Their incorporation cannot be attacked in a collateral proceeding, and the acts of a *de facto* district like that of any other public *de facto* corporation are binding, and the bonds of such a corporation are valid.²

The officers of these districts are elected or chosen in the manner provided in the acts relating to the districts.

The business of the districts in many of the States are usually conducted at regular or special meetings of the taxable voters, or residents, or the legal voters, called for the purpose, and it is usually held that a majority vote of those present is sufficient to carry any proposition, including the issue of bonds, unless some statute or the constitution changes this rule.³

In Nebraska, under the act of March 31, 1887, § 28, which authorized the board of education of a city to borrow money upon bonds which can only be issued after the submission of the proposition to the voters at an election called for that purpose, "or at any regular election," at which "a majority of the ballots polled" are in favor of issuing the bonds, that if the proposition is submitted at the regular election, it must receive, in its favor, a number of votes equal to a majority of all the votes cast for any officer at such election.

¹ Freeland v. Stillman, (Kan.) 30 P. R. 235; Hotchkiss v. Plunkett, 60 Conn. 230. In Iowa they are held to be municipal corporations. Curry v. Dist. Tp. of Sioux City, 62 Iowa, 102.

² State v. School Dist. No. 19 Sioux Co., 42 Neb. 499; Nat. Life Ins. Co. v. Board of Ed. City of Huron, 62 F. R. 778; O'Neill v. Battie, 62 Ill. 618.

³ State v. Cole, 51 N. J. L. 277; State v. Clark, (N. J.) 19 A. R. 462; Miller v. School Dist. No. 3 (Wyo.) 39 P. R. 879. In Smith v. Proctor, 130 N. Y. 319, it was held that

under the Laws of 1864, Chap. 555, which provided that an issue of school bonds must be authorized by a vote "of a majority of all the inhabitants of any school district entitled to vote, to be ascertained by taking and recording the ayes and nays of such inhabitants attending at any school district meeting," a vote in favor of the bonds by a majority of those voting is sufficient to authorize the issue of bonds, even though such majority is less than one-half of the voters actually present at the meeting.

Where the business of the school district is to be transacted by the voters or the taxable inhabitants of the district, nothing but the business noticed in the call for the meeting can be transacted.¹ Where the meeting was called "for the purpose of taking a vote upon the question of building a school-house and such other questions as are necessarily related to the building of said school-house," it was held that such notice was sufficient to authorize those present to vote a direct tax for the school building.² The meetings must be called by the board as a body,³ unless the statute authorizes one member or more to call it.⁴

Unless the statute directs otherwise those assembled at such a meeting may vote by ballot, and where the statute requires that a vote be taken by ballot such a provision is mandatory.⁵

In New Jersey it has been held that a statute which permitted females to vote for school trustees was unconstitutional,⁶ but that a statute which permitted them also to vote at a school meeting upon the proposition to issue bonds was constitutional as to the latter and that they could take part in the meeting and vote.⁷

The statutes usually prescribe that the clerk or directors or board shall give notice of the meetings. The notice must state the purpose of the meeting, and such notice is sufficient if the purpose or object of the meeting can fairly be understood from the notice.⁸

When the time and place must be stated, no legal meeting can be held at any other time or place,⁹ but it may be held within a reasonable time after the time stated.¹⁰

¹ State v. Clark, 19 A. R. 462; Lamb v. Hurff, 9 Vr. 310.

² Peters v. Township of Warren, 98 Mich. 54.

³ State v. Lockett, 54 Mo. App. 202.

⁴ Central G. S. House v. School Dist. No. 3, (Mich.) 58 N. W. R. 324.

⁵ Chamberlain v. Board of Education, (N. J.) 31 A. R. 1935.

⁶ Kimball v. Hendee, 30 A. R. 891.

⁷ Chamberlain v. Board of Ed., 31 A. R. 1035.

⁸ School Dist. v. Blakeslee, 13 Conn. 227.

⁹ Sherwin v. Bugbee, 16 Vt. 444; Chamberlin v. Dover, 13 Me. 466.

¹⁰ School Dist. v. Blakeslee, 13 Conn. 227.

Many of the school districts are governed by a board of education, or trustees, or directors, and their authority to issue bonds for school purposes depends upon the statutes relating to them. Sometimes the school district, or more properly speaking, in such a case, the school corporation or body charged with the educational interests of a municipality, is created by and included in the special charter of the municipality, or under the same general laws under which the municipal corporation becomes incorporated. In such cases it is a distinct corporation and its powers are to be found in the charter and other general or special laws relating to it.

In many of the States such boards or commissions are authorized to issue bonds without first submitting the question to the voters, while in other States such submission is required by the statute or by the Constitution.

In the absence of constitutional restrictions the Legislature may grant to these districts, or boards, or commissions any powers it may deem necessary, and make such provisions as to the composition of the board or commission it deems best for the public interest. So also as to the territory over which the board shall have authority to act. It may embrace a town, or a city, a county, or a part thereof, or a city and adjacent territory.¹

As the same general principles of law govern the issue of bonds and all the questions connected therewith no matter by what public officer or public corporation issued, the author does not deem it necessary or advisable to subdivide the subject of the work so as to treat separately of the questions relating to bonds when issued by the several public corporations, municipal or *quasi*-municipal. In the index the matters peculiar to each class will be found grouped together.²

§ 4. **The municipal bond** is an executed promise, usually

¹ State v. Hine, 59 Conn. 50. See town of Marseilles issued its bonds also, "Schools," 31 Am. & Eng. Ency. of Law, p. 748.

² The municipal bond cannot be payable to bearer in the fourteenth century. See Laws on Negotiable Securities, II. D. Jenken (1880, London), pp. iv, v, vi. And it is said to be an entirely modern or American invention. It was known now the practice in a number of the in Venice as early as 1171, and the continental cities to issue municipi-

under seal, on the part of a municipal corporation to pay to a person named or his order or to bearer a sum certain at a fixed time or some other time agreed upon with interest, the interest being usually represented by attached coupons payable at fixed periods until the principal is to be paid.

The bonds are issued for the purpose of raising money for local municipal necessities.

The rapid settlement of the vast territory of these United States and the marvellous growth in number of the various municipalities throughout it, as well as the phenomenal increase in population of the latter during the last fifty years, added to the increased municipal conveniences and necessities required by modern society, have compelled municipal corporations to resort to some means of obtaining money in order to make immediate local improvements for the health, comfort, convenience and general welfare of their inhabitants, and not to wait before obtaining these, to raise the money therefor by the slow process of taxation. The means pursued to obtain this end is the issue of obligations by the municipal corporation, which are sold by it and the proceeds applied to obtain the needed municipal objects. The obligations so issued are to be afterward paid by taxation.

It has now become the common practice for municipal corporations to issue and sell their obligations which are now known as "Municipal Bonds," for the purposes aforesaid, as well as many other corporate purposes, and this is now so extensively adopted for the purpose of obtaining money for immediate use that it is estimated that at least \$150,000,000 of municipal bonds are annually issued in the United States and placed upon the money market. These securities find a ready sale and are regarded, for good reasons, as one of the safest modes of investing money. They are held largely by banks and banking institutions, trust and insurance companies, as well as by individuals, for investment.

pal interest-bearing paper, which is sold either privately or publicly, and the proceeds used for municipal purposes. Municipal Government in Continental Cities. by Albert Shaw, pp. 130, 208-9, 289.

In a number of the States, so highly are these securities considered, the various moneyed institutions have been authorized by statute to invest in such bonds, although issued by municipal corporations situated in other States. Such statutes, however, usually require that the municipality whose bonds may be thus held be not indebted above a certain percentage.¹

It is not to be presumed from the above remarks that all municipal bonds are to be considered as a good investment, because the financial standing of the municipality issuing the bonds enters largely into the value of its bonds, although it must be said but a very small percentage of the bonds issued are repudiated, though payment is sometimes delayed, so small in fact that it is scarcely ascertainable ; provided the bonds are legally issued, and it is with this latter subject this volume treats.

¹ The following States have passed such laws : Maine, Laws of 1895, Chapter 161 ; New Hampshire, Act to regulate the investment of Savings Banks, Approved March 20th, 1895 ; Vermont, an Act to amend Act No. 12 of the Laws of 1888, relating to investments by Savings Banks and Trust Companies, Approved November 22, 1892 ; Massachusetts has a number of such laws ; Rhode Island, statutes of 1882, p. 379 ; Connecticut, Act approved June 23, 1893 ; New York has many such laws. As to Savings Banks, see Laws of 1895, Chap. 813 ; New Jersey Laws of 1881, Chap. 218 ; 1878, Chap. 254 ; 1883, Chap. 116.

CHAPTER II.

POWER TO MAKE LOANS AND ISSUE NEGOTIABLE PAPER.

SECTION.

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It is proposed to treat this subject under three distinct heads :

1. Express power to issue such paper.
2. Implied power to issue such paper when the power to borrow is express.
3. Implied power to borrow.

§ 5. **Express power to issue negotiable paper.**—Fortunately the power to issue negotiable bonds and other negotiable paper is to be found more often conferred in

express language by either the charter of the municipality or by some general or special act than otherwise, and when it is expressly conferred fewer questions arise in relation to the paper issued under such authority than when the power to issue is implied. When the authority to issue such paper is expressly conferred there arises, of course, the question whether the enabling act is constitutional, whether its object is a public or private one, and the necessary proceedings prior to the issue of course must be taken these ; however, are treated of elsewhere herein.

The bonds must be issued when the power is express to do so only for the objects specified in the enabling act and cannot include other objects.²

§ 6. **Proceedings when power is express.**—It is sufficient to say here that all the proceedings leading up to the issue of the bonds must be strictly followed, and whatever the enabling act requires to be done must be performed, and the act must be strictly conformed to or the issue will be restrained. Usually the act fixes the maximum amount of bonds which may be issued, and in that case it cannot be exceeded ; it also fixes the maximum rate of interest, and that also cannot be exceeded ; it usually specifies the object for which the bonds may be issued, and this must be a public one. It usually designates the body or officers who may authorize the issue of the bonds, in which case they can be issued by no other body or officers ; likewise when it designates what officers shall execute the bonds no other officers can do so.

If the act is constitutional and all the steps leading up to and including the issue and delivery of the bonds are properly pursued as required by law, few, if any, questions, can arise in relation to such bonds, and it is the want of proper care or the wilful disregard of public duty or a fraudulent intent on the part of the officers charged with the duty of issuing or delivering the bonds that cause the bonds to be questioned in such cases.

§ 7. **A State must have express power to issue bonds.**—It is the general rule that a State, or the officers

¹ State v. Bayonne, 49 N. J. L.308.

of a state for it, cannot issue negotiable bonds unless the Legislature has authorized their issue. All who deal with a State or its officers are bound to ascertain whether the State or its officers have legislative authority to do the act proposed.¹ The State itself cannot borrow money through its officers except in pursuance of express power conferred by the legislative department of the government.²

§ 8. **Implied power when the right to borrow is expressed.** The right of a municipality to issue its negotiable bonds and other securities when it has the express right to borrow money seems to be plain and is upheld by numerous decisions of the courts. Negotiable bonds, being one of the most convenient and salable forms of municipal securities, are selected and most commonly used when the authority to borrow is vested in a municipality.³

Express power to borrow money, perhaps, in all cases, but especially if conferred to effect objects for which large or unusual sums are required, as, for example, subscriptions to aid railroads and other public improvements, will ordinarily be implied if there be nothing in the legislation to negative the inference to include the power (the same as if conferred upon a corporation organized for pecuniary profit) to issue negotiable paper with all the incidents of negotiability.⁴ Many of the State courts, while they deny the right of a municipal corporation to issue negotiable paper from any implied power, recognize and admit that when the municipality has the express power to borrow it may issue its paper, negotiable in form, which will have all the attributes of commercial paper.⁵

¹ Ward v. U. S., 1 Nolt & H. 360; 1 Ill. 423; Williamsport v. Com., 84 Whiteside *et al.* v. U. S., 93 U. S. Penn. 487; Evansville R. R. Co. v. 255; State of Missouri v. Bank, 45 Evans, 15 Ind. 395; West Plains Mo., 528. Tp. v. Sage, 69 Fed. R. 943-8.

² Burroughs on Pub. Securities. ⁴ Dill. on Mun. Corp. § 125 (4th ed.).

³ Lewis v. Comanche Co., 133 ⁵ Holmes v. City of Shreveport, U. S. 198; Com. v. Pittsburgh, 34 31 Fed. Rep. 113; Folsom v. School Penn. 496; Galena v. Corwith, 48 Directors, 91 Ill. 401; Williams-

Mr. Daniel says: "When the power to borrow the money is clear it necessarily involves in its exercise the execution of a security for its payment; and negotiable bonds being the common and most acceptable form of municipal securities when given for money legitimately borrowed would undoubtedly be valid."¹

§ 9. **Former attitude of the United States courts.**—The United States Supreme Court in several decisions has adopted the same doctrine.

In the case of *Rogers v. Burlington*, 3 Wall. 654, it held the power, "to borrow money for any public purpose," authorized the city of Burlington to subscribe for stock in a railroad company and issue its negotiable bonds to the company to be sold by it, the proceeds of the sale to be used to pay for the stocks.

And in another case it held that where a city had authority to subscribe to stock in a railroad company "as fully as an individual," such power authorized it to issue its negotiable bonds.² And in another that the power of a municipality to borrow money for any object in its discretion authorized it to borrow money upon its negotiable bonds and to subscribe for and pay for stock with the money so obtained.³

Notwithstanding the fact that it has been the uniform doctrine of the State courts that when the municipal corporation has the express authority to borrow money it may issue its negotiable paper in order to obtain the loan, and that this doctrine has been recognized and applied to its extreme length by the United States Supreme Court in a number of cases, that court in a more recent case has held that the naked power to borrow did not include the power to issue negotiable instruments, and that in order to do so the statute must further empower such issue.

§ 10. **Present attitude against such power.**—The case is that of *Brenham v. German American Bank*, 144 U. S. 173, the court held that bonds issued by the city

port v. Commissioners, 84 Pa. 487; Opinion of Dissenting Judges.

¹ Daniel on Neg. Inst. § 1531.

² *Seybert v. City of Pittsburgh*, 1 Wall. 572.

³ *Meyer v. Muscatin*, 1 Wall. 387.

of Brenham, which had authority to borrow for general purposes not exceeding \$15,000, were invalid in the hands of even a *bona fide* holder of them. The court further held: "That in exercising its power to borrow not exceeding \$15,000 on its credit for general purposes the city could give to the lender, as a voucher for the payment of the money, evidence of indebtedness in the shape of non-negotiable paper is quite clear, but that does not cover the right to issue negotiable paper or bonds unimpeachable in the hands of a *bona fide* holder. . . . It is easy for the Legislature to confer upon a municipality when it is constitutional to do so the power to issue negotiable bonds, and under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence it ought not to be held to exist in the present case."

The court further held the often quoted cases of *Rogers v. Burlington*, *supra*, and *Mitchell v. Burlington*, 4 Wall. 270, to be overruled.

A very vigorous dissenting opinion was filed by Harlan, Brewer and Brown, JJ., in which they said:

"It seems to us that the court in the present case announces for the first time that an express power in a municipal corporation to borrow money for corporate or general purposes does not, under any circumstances, carry with it, by implication, an authority to execute a negotiable note or bond for the money so borrowed, and that any such note or bond is void in the hands of a *bona fide* holder for value. There are, perhaps, few municipal corporations anywhere that have not, under some circumstances and within prescribed limits as to amount, express authority to borrow money for legitimate corporate purposes.

"While this authority may be abused, it is often vital to the public interests that it be exercised. But if it may not be exercised by giving negotiable notes or bonds as evidence of the debt so created, which is the mode usually adopted in such cases, the power to borrow, however urgent the necessity, will be of little practical value. Those who have money to lend will not

lend it upon mere vouchers or certificates of indebtedness.

“The aggregate amount of negotiable notes and bonds executed by municipal corporations for legitimate purposes under express power to borrow simply, and now outstanding in every part of the country, must be enormous. A declaration by this court that such notes and bonds are void, because of the absence of express legislative authority to execute negotiable instruments for the money borrowed, will, we fear, produce incalculable mischief. Believing the doctrine announced by the court to be unsound, upon principle and authority, we do not feel at liberty to withhold an expression of our dissent from the opinion.”¹

§ 11. **Result.**—As said in the able dissenting opinion, millions of dollars of bonds and securities have been is-

¹ The rule laid down in *Brenham v. Bank* has been followed in the United States Circuit Court of Appeals for the eighth circuit, in the case of *Ashuelot Nat. Bk. of Keene v. School Dist. No. 7*, (1893) 56 F. R. 514.

In this case negotiable bonds issued by a school district in Nebraska were declared invalid. The act under which they were issued provided: “Any school district shall have power and authority to borrow money to pay for the sites of school-houses, and to erect buildings thereon, and to furnish the same by a vote of a majority of the qualified voters.”

The bonds were issued for the said purposes, and recited the title of the act. The court held them to be invalid because negotiable in form, holding that authority to issue negotiable bonds must be express, and that the mere power to borrow does not authorize the issue of such bonds.

The court by Thayer, D. J., after referring to the rule laid down in

Merril v. Monticello, 138 U. S. 673, and *Brenham v. Bank*, in part said:

“We think, however, that we may fairly affirm that the two authorities heretofore cited do establish the following propositions: First, that an express power conferred upon a municipal corporation to borrow money for corporate purposes does not in itself carry with it an authority to issue negotiable securities: Second, that the latter power will never be implied, in favor of a municipal corporation, unless such implication is necessary to prevent some express corporate power from becoming utterly nugatory: and Third, that in every case where a doubt arises as to the right of a municipal corporation to execute negotiable securities the doubt should be resolved against the existence of any such right.

“The application of these principles to the case at bar satisfies us that the judgment of the Circuit Court was for the right party and should not be disturbed.”

sued by municipalities under a general power to borrow money and are outstanding in the hands of innocent holders. The effect of this decision may make invalid such securities, although issued and purchased in the utmost good faith, unless the same have been issued after the courts of last resort of the respective States have passed, with approval, upon the act or charter under which they have been issued, or the authority to issue bonds generally under the naked express power to borrow has been affirmed by the court of last resort of the State in the construction of such State laws or the Constitution.

§ 12. When the Federal courts follow the State courts.

—It is the doctrine of the United States Supreme Court, in cases of this nature, that it is not bound to follow the decision of the court of last resort of a State made after the bonds are issued and sold, but is only bound to follow decisions made prior to the issue and sale, and even in these cases the decision of the Supreme Court of the State must have been upon the construction of peculiar provisions of the State Constitution or laws.¹ The Federal courts will adopt the settled decisions of the highest court of a State which has determined the intent and character of the power which its political and municipal organization shall possess.²

It was urged in the above case of *Brenham v. German American Bank*, that as the Supreme Court of Texas had recognized the validity of the very issue of bonds in dispute, in the case of *Dyer v. Hackworth*, 57 Tex. 245, the court should be guided by that decision, but as the Texas case only decided that it could not enjoin the collection of taxes to pay interest on the bonds without making the holders parties, the court refused and said that there was therefore no adjudication in that case as to the validity of the bonds, it was not bound to follow it,

¹ *Brenham v. Ger. Am. Bk.*, 144 U. S. 173; *Venice v. Murdock*, 92 U. S. 400; *Howard v. Francis Co.*, U. S. 494; *Ger. Sav. Bk. v. Franklin Co.*, 128 U. S. 526; *Dill. on Mun. Corp.*, Vol. I. 517.

and decided the case upon general principles and precedents in its own court.

§ 13. **Implied power depends on the decision of the State courts.**—It follows, therefore, since this recent doctrine of the U. S. Supreme Court curtailing the implied power of municipalities to issue negotiable paper, when the power to borrow is express, that the authority for the exercise of such power must rest hereafter upon the decision of the courts of last resort of the respective States in the construction of their statutes and constitution in reference to such powers and as to the extent and character of the powers of their political and municipal organizations, which decisions the Federal courts will follow, and not upon the broad principle heretofore adopted, that the express power to borrow carries with it (unless some provision of the Constitution or statute law prohibits) the right to issue negotiable securities to obtain the money.¹

§ 14. **Implied power to issue negotiable paper.**—Almost all of the elementary writers are of the opinion that the practice of issuing negotiable paper by a municipality, unless power to borrow be expressly conferred, is wrong, and condemn the practice in vigorous language, and some claim that a municipal corporation cannot issue its negotiable paper without legislative authority, and that where the corporation is authorized to execute some power requiring a large expenditure of money, while they admit that under such circumstances the

¹ *Clairborne Co. v. Brooks*, 111 U. S. 400; *Francis v. Howard*, 50 Fed. Rep. 44.

In *City of Evansville v. Woodbury*, 60 Fr. R. 718. The court in this case said:

“The Federal courts have maintained a rule from their organization, that in all cases depending on a State statute they will adopt and follow the adjudications of the court of last resort in the State in its construction, when that construction is well settled, and with-

out inquiry as to its original soundness. This rule is founded upon respect for property rights, as well as of comity, and had its early expression in Chief Justice Marshall, and has been upheld by an unbroken line of decisions.

“Therefore the recent decisions in *Merril v. Monticello*, 138 U. S. 673, and *Brenham v. Bank*, 144 U. S. 173, cited in behalf of the plaintiff in error as decisive, are not applicable.”

corporation may issue its evidence of debt to its creditors who may be engaged to do the public work, deny that in order to obtain the money therefor, it has the implied authority to issue negotiable paper, which will be free from equities in the hands of third persons, or which it may sell in order to obtain the means to do the public work.¹

While it must be conceded that the above views are wiser and safer than the opposite doctrine, and, if followed by all the State courts, would doubtless, to a very great extent, act as a check upon municipal extravagance and compel them to a "pay as you go" policy, which would make them careful in their expenditures and prevent the incurring of debt to be paid by future generations, yet it must be confessed that the doctrine of most of the State courts is favorable to the opposite view, while the Federal courts are more conservative and adopt the view that the power to issue negotiable instruments by municipal corporations must be expressed, and is not to be implied, and if issued under an implied authority are void in all hands.²

The power to borrow money and issue negotiable paper for the ordinary annual current expenses of municipal government, although supported by a number of cases,³ cannot be condemned in too vigorous language. The ordinary powers of municipal corporations, as the support of the police, of a fire department, of a department of charities and corrections, of public schools, of lighting the streets and public places, of waterworks, the laying out, and improving, and care of streets, of public libraries, of parks, and the many other municipal conveniences and necessities, which are for the protection, or comfort, or education, or even the enjoyment of the inhabitants, are usually all paid for by taxes levied annually upon the property within the corporation.

¹ Jones on R. R. Securities, § 283 : 566 ; Brenham v. Ger. Amer. Sav. Burroughs Pub. Securities, p. Bk., 144 U. S. 173.
185.

² Mayor v. Ray, 19 Wall. 468 ; 84 Pa. St. 487 ; Desmond v. Jefferson, 19 Fed. Rep. 483 ; State v. Police Jury v. Britton, 15 Wall. Babcock, 22 Neb. 614.

These are ordinary powers and are exercised continuously, and it would seem that the corporation should not have the incidental power to issue its negotiable paper in order to obtain money wherewith to carry them out, when the charter of the municipality has provided that the money to pay for such expenditures should be obtained by taxation.

Judge Dillon has stated ¹ what he regards to be the true doctrine: "That merely as incidental to the discharge of its ordinary corporate functions no municipal or public corporation has the right to invest any instrument it may issue, whatever its form, with that supreme and dangerous attribute of commercial paper which insulates the holder for value from defences and equities which attach to its inception. This point ought to be guarded by the courts with the utmost vigilance and resolution."

§ 15. **The authorities upon this question are much divided**, but, as said before, the weight of the decisions are in favor of the view that, when the municipality is authorized or required to make some public improvement, or to aid in one, and the means with which the same is to be carried out are not provided for in the charter or other legislative act authorizing or imposing such a duty, that the municipality may, in order to accomplish the objects, borrow money. It follows from the weight of decisions that the implied power to borrow money includes, by implication, the power to arrange for the payment of the debt so contracted by the issue of negotiable bonds or other securities which shall possess all the characteristics of other commercial paper.²

§ 16. **Weight of authority in favor of such power—Cases.**—Notwithstanding the fact that such a power is dangerous, it seems to be the general doctrine of the State courts that, whenever it is necessary to carry out some public improvement authorized by statute, and the means are not provided for therein, and the cost is too great to

¹ Dill. on Mun. Corp. (4th ed.) § 500; Bangor Sav. Bk. v. Stillwater, 126.

46 Fed. Rep. 899; Little Rock v.

² Williamsport v. Com., 84 Pa. Bank, 98 U. S. 308.

be obtained by immediate taxation, and the statute does not indicate such intent, the municipality may borrow the money necessary and give therefor its negotiable bonds or other securities.¹

It is a general rule of the State courts that whenever the municipality may contract a debt it may borrow money to pay for it.²

A few of the cases illustrating the above are given to show the position of the courts in regard to the issuing of negotiable paper when the power to borrow or issue the paper is not given in express words.

In the case of *State v. Babcock*, 22 Neb. 614, it appeared that Sec. 37, Ch. 14, Comp. St. 1887, gave to cities of the second class the right to make regulations to secure the general health of the city, and to construct sewers and regulate their use. Under this authority it was held that, when it became necessary to construct a sewer, the city had power to borrow money therefor and to issue its bonds for the same. "We are fully aware," said the court, "of the necessity for great care in the exercise of the right to borrow money by municipal corporations, when the power to do so should not be held to have been conferred except when expressly given, or where absolutely necessary to carry out and make effective the power expressly conferred.

"We think the case falls clearly within the latter class and that the bonds were legally issued."

In *Desmond v. Jefferson*, 19 Fed. Rep. 483, express power to organize and regulate a fire department was held to imply the right to issue bonds to obtain the money necessary therefor.

§ 17. *Cases in Pennsylvania.*—In the case of *Williamsport v. Com.*, 84 Pa. St. 487, the court said: "In its broad sense, the power to borrow money and issue bonds

¹ *Douglass v. Virginia City*, 5 Inst. Vol. 2, § 1529; *Tiedman on Nev.*, 141; *Bank of Chillicothe v. Mun. Corp.*, § 182; *Bangor Sav. Mayor*, 7 Ohio, pt. 2, 31; *Sturtevant Bank v. Stillwater*, 46 Fed. Rep. v. Alton, 3 McLean, 393; *Lynde v.*, 899.

County, 16 Wall. 42; *Mills v. Gleason*, 11 Wis. 470; *Daniel on Neg.*,

² *Daniel on Neg. Instr.*, § 1530.

therefor cannot be said to be among the implied powers of a municipal corporation. For general purposes, such power does not exist, for the reason that it is not necessary for the objects for which it was created. Thus it has never been contended that a municipality may borrow and issue bonds or notes for objects having no necessary relation to the performance of municipal duties. To admit such a principle would be destructive of such organizations, and place the taxpayers of a city at the mercy of the first band of plunderers who should happen to obtain the temporary control of its affairs. The question for our consideration is, whether the power to issue bonds is one of the inherent powers of a municipal corporation in a limited sense, that is to say, for the purpose of providing for such expenditure as is strictly germane to the objects for which such corporations are created. We are not without authorities that question, if they do not deny, this power. Judge Dillon, one of the ablest writers upon this branch of law, says, in his treatise of the Law of Municipal Bonds: 'We regard as alike unsound and dangerous that a public or municipal corporation possesses the implied power to borrow money for its ordinary purposes, and as incidental to that power to issue commercial securities.' The ground relied upon by that learned author and others who take that view of the question is, that the power is a dangerous one. But showing that the power is dangerous does not prove that it does not exist. Power is always dangerous. The dangerous nature of a power might be a persuasive argument with the Legislature why it should be denied to a municipal corporation, but cannot be accepted as a conclusive reason that it does not exist. I am willing to concede that the power to issue municipal bonds is dangerous. It affords opportunity to unscrupulous men, hungering for the spoils of rich municipalities, to enter into extravagant contracts at ruinous prices, by mortgaging the resources of the people in advance. The facility of placing municipal bonds at high rates of interest and having many years to run is certainly a great inducement in many cases to

unwise and lavish expenditures. It might have been better for the Legislature in the first instance to have applied the principle of pay as you go to such corporations, and to have required them to seek legislative action, whenever they sought to incur obligation. This, however, is a question with which we have no present concern."

The majority of the court, after reviewing the authorities, further said: "The following cases rest upon the principle, which we think a sound one, that where a municipal corporation has lawfully contracted a debt, it has the implied power, unless restricted by its charter or prohibited by statute, to evidence the same by a bill, bond, note or other instrument; that the power to contract a debt carries with it, by necessary implication, the right to give an appropriate acknowledgment of such debt, and to agree with the creditor as to the time and mode of payment; that in the absence of statutory provision there is no rule of law limiting the extent of the credit."

In this case the bonds were issued to pay pre-existing debts and to obtain money to grade and pave streets, being authorized to do the work by the city charter before the improvements were made; the bonds were sold at a heavy discount and the proceeds thus obtained applied for those purposes.

Agnew, C. J., and two associate judges, dissented from the opinion of the court, and held the bonds to be invalid, because part of them were issued in advance of any debt incurred for grading and paving, and as a means of raising money to pay for the future improvements, and because of the sale at a discount. They, however, admitted that a municipal corporation has the implied power to give suitable evidences of an authorized debt actually incurred, but whether such evidence of an actual debt was negotiable or not was not by them discussed. They denied any incidental power in municipal corporations, as a means of raising money, to execute its ordinary charter power "to issue commercial paper, be it bonds or notes, payable to bearer, and negotiable according to the law merchant

and general usage, and either to sell them in the market or pass them off to individuals by way of a loan."

They also admitted that where express power to borrow is given, a municipal corporation has the right to issue negotiable bonds, bills, and notes.

The above case is given at some length, because the opinion of the majority of the court carries the implied right of a municipal corporation to borrow money and issue its negotiable paper to the extreme limit; and the dissenting opinion, while followed by but a few of the State courts, is, in the opinion of the writer, the conservative and safer view of the question.

§ 18. **In Ohio the question** arose as early as 1836. The town of Chillicothe possessed authority to erect public buildings, purchase lands, pave streets, and other municipal powers of like character, but the right to borrow money was not expressly granted.

The suit was upon some bonds of the town issued to obtain money to carry out some of the expressed powers, and the question was, whether the right to borrow was granted by implication.

The court held¹ that in carrying out the expressed powers, or in effecting any legitimate municipal object, the corporation possessed the incidental or implied power to borrow money, and held the bonds to be valid. The principle laid down in this case has since been followed in the courts of that State.

§ 19. **In Wisconsin the Supreme Court**, in *Miles v. Gleason*, 11 Wis. 470 (1860), affirmed the implied authority of a municipal corporation as incidental to the execution of express general powers to borrow money and issue its bonds therefor, it appearing that the proceeds thereof went into the treasury of the city and were expended by it.

The court said: "The charter confers the power to purchase fire apparatus, cemetery grounds, etc., to establish markets, and to do many other things for the execution of which money would be necessary as a means.

"It would seem, therefore, that in the absence of any re-

¹ *Bank v. Chillicothe*, 7 Ohio, pt. 2, p. 31.

striction, the power to borrow money would pass as an incident to these general powers according to the well-settled rule that corporations may resort to the usual and convenient means of executing the powers granted ; for certainly no means is more usual for the execution of such objects than that of borrowing money.”

§ 20. **In Illinois the question** has been passed upon in a number of cases. It is well settled in that State, that the power to borrow money or create indebtedness is not incidental to municipalities, and cannot be exercised unless it is conferred by their charter, or it is a necessary means of carrying out some municipal improvement expressly authorized.

In the case of *Law v. People*, 87 Ill. 385, the court said : “ The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them by their charters, and all persons dealing with them must see that the body has power to perform the proposed act. Such corporations are created for governmental and not for commercial purposes.

“ Hence power to borrow money or to create indebtedness is not an incident to such local governments, and the power cannot be exercised unless it be conferred by their charter, and no one has the right to presume the existence of such a power, and persons proposing to loan money to these bodies must see that the power exists.”

In the case of *Hewitt v. Normal School Dist.*, 94 Ill. 528, the court said :

“ The borrowing of money, the purchase of property on time, and the giving of commercial paper are not inherent in, or even powers usually conferred upon, municipalities, and unless endowed with such powers in their charters, they have no authority to make and place on the market such paper ; and persons dealing in it must see that such powers exist.

“ This has long been the rule of this court.”

In the same State, in the case of *Folsom v. School Directors*, 91 Ill. 404, the court held that the power to borrow money carries with it the power independent of the statute to give the evidence of the loan.

§ 21. **In Indiana it is well settled** that the municipalities, in order to carry out express powers, have the implied power to borrow money. In *Richmond v. McGirr*, 78 Ind. 192-198, where the city had power to purchase real estate for public buildings, the court decided that the common council had the implied power to purchase on credit and to issue negotiable bonds for the purchase money, and on the application of a taxpayer the court refused to enjoin the issue of the bonds.

In the case of *Smith v. City of Madison*, 7 Ind. 81, the court, in defining the power of municipal corporations, used the following language: "Municipal charters are to be construed, as to carrying into effect every power clearly intended to be conferred, and every power necessary to be implied for the complete exercise of the power granted."

In the case of *New England Co. v. Robinson*, 25 Ind. 536, it was further held that "corporations along with the express and substantial powers conferred by their charters, take by implication all the reasonable modes of exercising such powers which a natural person may adopt in the exercise of similar powers."

The later decisions on this subject are all in accord with the above.¹

§ 22. **In New Jersey**, the Supreme Court, in case of *Hackettstown v. Swackhamer*, 37 N. J. L., p. 191, while denying the power of municipalities to borrow money for the ordinary municipal uses, admitted that "it is practicable to impose a duty on a municipality requiring the immediate use of large sums of money, and in such a situation the inference may become irresistible that it was intended that funds were to be provided by loans."

The language of the court would indicate that where a duty is imposed upon a municipality requiring the expenditure of large sums of money to accomplish the same, that in such cases the authority to borrow and issue negotiable securities would be implied.

§ 23. **In New York it was held**, in the early and much cited case of *Ketchum v. City of Buffalo*, 14 N. Y. 356

¹ *Daily v. Columbus*, 49 Ind. 169; *Miller v. Commissioners*, 66 Ind. 162.

(1856), that, in the absence of a law to the contrary, the city of Buffalo could purchase grounds for a market on credit and issue bonds to pay for the same.

In this case it appears the city purchased grounds for a market for thirty-five thousand dollars, and gave in payment its bond for that sum payable in twenty-five years, with interest every six months.

In a suit by a taxpayer to restrain the levy of a tax upon the bond, the Court of Appeal refused to entertain the application and held the bond valid, holding the power to establish markets included the power to purchase the ground on credit.

The bond was given to a person from whom the ground was purchased, and the court intimated that there was a difference between issuing bonds to pay for an object and issuing bonds to be sold in the open market, and condemned the latter course.

In the case of *Hubbard, Executor, v. Sadler*, 104 N. Y. Sup. Ct. 223, where it appeared a statute gave to supervisors of certain counties power to pay for and construct certain streets and avenues, and to provide by limited or general assessment for the payment of damages awarded for the property taken, they authorized the issue of short term bonds upon which to borrow money for the payment of the awards, and the town was to be reimbursed by the local assessments for benefits, and the deficiency by general taxation.

The court held that the supervisors had the implied authority to issue the bonds, and that control over the whole subject, as to all incidents and details, and the mode of accomplishing the purpose, was conferred upon the supervisors. The court said: "They could, as they did, and as was right and reasonable in the interest of the land-owner, anticipate the slow collection of such proceeds by borrowing the money needed for payment to pay the awards, giving in exchange the obligation of the town, running only for comparatively brief periods.

"We think the grant of legislative power was not exceeded by the act of the supervisors in providing, through a temporary loan, for the prompt and immediate payment

of the awards pending the ultimate reimbursement by taxation."

The court held the supervisors had this implied power, although the statute also provided in express words for the issue of bonds for other purposes.¹

§ 24. **Other cases.**—In the case of *Holmes v. City of Shreveport*, 31 Fed. Rep. 113, it appeared the city was authorized by its charter to contract for certain public works. It agreed to pay certain contractors one-half cash and the balance in ten-year-coupon bonds for the said work. A number of such bonds were issued, and this suit was brought by the holder of some of them to whom they had been passed before maturity.

The court said: "In deciding now in favor of the validity of these bonds as commercial securities, it cannot be said that we are imposing upon or enforcing against the constituents of the corporation a debt doubtful in its origin, or one not lawfully incurred, or one not justly due to somebody, because it is clear enough that the debt is unpaid, and that the city's agents had ample power to ordain and direct that the public work should be done, and to legally bind the corporation for the debt, that is, for the price of the public works. It being conceded that the city had ample power to bind the corporation to pay for the public works, when performed by the contractors to whom the bonds were issued, I can see no reason in law for denying the city's power to clothe the bonds or promissory notes so issued with such attributes of negotiability as will place a *bona fide* holder of the bonds under the protection of the law merchant."

§ 25. **Cases against such implied authority.**—There are a number of cases which support the doctrine that there is no implied power to issue negotiable instruments,² and one often cited is that of *Knapp v. Mayor of Hoboken*.³ In this case the city issued to a contractor improvement

¹ See also *In matter of Application of Church*, 92 N. Y. 1.

² *Dent v. Cook*, 45 Ga. 323; *Burrill v. Boston*, 2 Cliffe, 590; *Beaman v. Lake Co.*, 42 Miss. 237; *Par-*

sons v. Monmouth, 70 Me. 262; *Newgars v. City of New Orleans*, 42 La. Ann. 163.

³ 39 N. J. L. 394.

certificates, negotiable in form, and the court held that they were not negotiable, except so far as to enable the holder to sue thereon in his own name, but that they were subject to all equities existing between the city and the contractor. In another case,¹ where the officer of the town borrowed money to defray the ordinary expenses of the town and gave a note therefor, the court held that a municipal corporation had no implied power to borrow money for the ordinary municipal purposes.

In Texas it was held that a municipal corporation did not have the implied power to issue negotiable bonds to build public schools, under a general statute which authorized such corporations to establish and maintain free schools, purchase building sites, construct school-houses, and generally to promote free education within the limits of their respective cities and towns.²

§ 26. Judge Dillon, in *Gausev. City of Clarksville*,³ held that bonds issued by the city to obtain money for the purpose of opening, clearing and paving the streets of the city, it having power under its charter to "open, clear, regulate, or improve streets of the city," but no express power to borrow money to do so, or to execute negotiable instruments, that such bonds were void, and after alluding to the doctrine of some of the courts that negotiable instruments were valid when issued under an implied power, said: "Such are the mischievous and alarming consequences of the unsound doctrine that a municipality has, by virtue of its ordinary powers and merely as a means of executing its ordinary duties, the power to pledge its credit by the issue and sale of its commercial obligations.

"It is not the law. No such doctrine can permanently stand.

"Although it has taken as yet no deep root in our jurisprudence, it has nevertheless obtained a sufficient development to show its noxious character. . . . We are required in this case only to determine the inherent or in-

¹ *Hackettstown v. Swackhamer*,
37 N. J. L. 191.

² *Waxahochie v. Brown*, 67 Tex.
519; 4 S. W. R. 207.

³ 5 Dill. 165.

cidental powers of the city to raise loans by a sale of its negotiable securities, payable at a distant day.

“ We deny such power. . . .

“ What we decide on this point is that the power to erect wharves and improve streets, conferred by the defendant's charter, does not carry with it the power to raise funds for that purpose by the issue and sale of negotiable securities like those here in this suit.”

In this very suit the court held certain other bonds called “ Road Improvement Bonds,” which were given in renewal of other bonds which had been given for stock, in a company authorized to macadamize roads under a special act, and which act permitted the city to subscribe to stock of a company authorized to macadamize roads of a city to be valid, upon the implied authority to issue the bonds because necessary in order to obtain money for the stock received from the company. Therefore the case decided that bonds issued to obtain money to carry out the ordinary charter powers were void because there was no express authority to issue them, while other bonds, likewise issued without express power, were valid because their issue was necessary to carry out some express power conferred by a special act—power not conferred by the charter.

§ 27. **A safe rule to follow.**—We consider the doctrine laid down by Judge Dillon in the above case to be a very safe one, which can be followed by all courts, viz. : that the corporation has no authority to issue negotiable instruments in order to obtain money to carry out the ordinary powers conferred by charter, but that when authority to do some special act, that is, one not ordinarily the work of the corporation, something which the corporation is not called upon to do as a matter of course from time to time in the ordinary affairs of the corporation, and the authority to do the particular act is conferred by special statute, that though no express authority to borrow is conferred, yet in such a case the authority to borrow may be implied as a necessary means of carrying out the special express powers conferred.

§ 28. **Difference between borrowing and issuing**

paper as evidence of indebtedness.—A large number of the cases lay particular stress upon the difference between the giving of a note or other evidence of indebtedness to a creditor, or one from whom money is borrowed, and the issuing of bonds and placing them for sale in the open market as commercial securities with all the characteristics of negotiable instruments, subject to no equitable or other defences in the hands of a *bona fide* holder for value.¹ And in many of the cases, the paper, if negotiable in form, is for that reason held to be void.²

§ 29. **Doctrine in U. S. Courts.**—It has become the settled doctrine of the Supreme Court of the United States that there is no implied authority in municipal corporations to make and place upon the market commercial paper of any kind, unless the power so to do is expressly granted by statute, or is clearly implied from some other power expressly given, which cannot be fairly exercised without it.³

The case most often referred to to show this difference is that of *Police Jury v. Britton*, 15 Wall. 566, in which Justice Bradley, who delivered the opinion of the court, said :

“That a municipal corporation which is authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur expenditures and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable considerations that may arise or exist between the parties, and to any modification, abatement or rescission in whole or in part that may be just and proper in consequence of irregularities or a disregard or betrayal of the public interest. Such contracts

¹ *Kuapp v. Mayor etc.*, 39 N. J. L. 394; *Ketchum v. Buffalo*, 11 N. Y. 356.

² *Merrill v. Monticello*, 138 U. S. 673; *Mayor v. Ray*, 19 Wall. 468. See § 30.

³ *Clairborne Co. v. Brooks*, 111 U. S. 400; *Hill v. Memphis*, 134 U. S. 198; *Kelly v. Millan*, 127 U. S. 139; *Young v. Clarendon Tp.*, 132 U. S. 340; *Bangor Sav. Bk. v. City of Stillwater*, 46 Fed. Rep. 899.

are very different from those which are in controversy in this case (negotiable bonds issued for the purpose of funding a previous indebtedness). The bonds and coupons on which a recovery is now sought are commercial instruments, payable at a future day, and transferable from hand to hand. The power to issue such paper has been the means, in several cases which have been brought to our notice, of imposing upon counties and other local jurisdictions burdens of a most fraudulent and iniquitous character, and of which they would have been summarily relieved had not the obligations been such as to protect them from question in the hands of *bona fide* holders. It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justice and validity of which may always be inquired into. It is a power that ought not to be implied from the mere authority to make improvements."

In the case of *Merrill v. Monticello*, 138 U. S. Rep. 673, it was held that the implied power to borrow money to enable a municipality to execute the powers expressly conferred upon it, if it exists at all, does not authorize it to create and issue negotiable securities to be sold in the market, and to be taken by a purchaser free from all equities that might be set up by the maker.

In regard to the implied authority of a municipal corporation to borrow money for the purpose of carrying on or making some public authorized improvement, a distinction is made between a municipal corporation proper, that is, a public chartered corporation, and a *quasi*-corporation, such as counties, school districts, road districts and towns.

While the weight of authority is in favor of the implied power of municipal corporations proper to issue such paper, the opposite doctrine is applied to *quasi*-corporations, and it is generally held that they must be expressly authorized to issue such paper.²

¹ See § 3.

² Dill. on Mun. Corp. (4th ed.) § 468. In the absence of statutory authority a county has no power to

S. 673; *Police Jury v. Britton*, 15 Wall. 566; *Mayor v. Ray*, 19 Wall. 468. In the absence of statutory authority a county has no power to

§ 30. The case most often quoted to show the distinction is that of *Clairborne Co. v. Brooks*, 111 U. S. 400, 406. The court below held that as the county had power to erect a court-house, that power implied the power to contract out the work and to issue negotiable bonds of a commercial character in payment thereof. Mr. Justice Bradley, who delivered the opinion of the court, reviewing the action of the lower court, said :

“ We cannot concur in this view. The erection of court-houses, jails and bridges are among the ordinary political or administrative duties of all counties, and from the doctrine of the charge that all counties have the incidental power, without any express legislative authority, to issue bonds, notes and other commercial paper in payment of county debts and charges, and if they have this power, then such obligations issued by the county authorities and passing into the hands of *bona fide* holders would preclude the county from showing that they were issued improperly, or without consideration, or for a debt already paid, and it would then be in the power of such authorities to utter any amount of such paper and to fasten irretrievable burdens upon the county without any benefit received. Our opinion is that mere political bodies constituted as counties are for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, have no power or authority to make or utter commercial paper of any kind, unless such power is expressly conferred upon them or implied from some other power expressly given, which cannot be fairly exercised without it.”

This distinction is drawn between *quasi*-corporations and municipal corporations proper, because the latter are clothed with the powers of local self-government and are chartered, being created either by special charter, or by the inhabitants of a certain district incorporating themselves under some general law, while the former, especially counties, are subdivisions of the State, without a

issue bonds. *Colburne v. Chatta-* R. 1042; *Young v. Com'rs*, 137 Ind. nooga Western R. Co., 94 Tenn. 43; 323.

Ball v. Presido Co., (Tex.) 29 S. W. 1

charter of incorporation, created for the purpose of assisting the State in its government and subject to the control of the State.

But as counties are now very often also clothed with the power of local government over matters that concern only the people within their limits, it may be that the courts will not draw the distinction so sharply, especially when the county authorities are directed or authorized by statute to make some public improvement affecting only the inhabitants of the county, and the power to borrow or issue negotiable paper is not in direct words authorized by the said statute. Should not the greater power include all the lesser, and as borrowing money is included in the latter, why should there be a distinction?

§ 31. **Position of the Federal courts.**—It seems to be the settled doctrine of the United States courts, when they are free to follow their own inclination, and are not bound to recognize the decisions of the court of the last resort of the States, that municipalities have not the implied power to issue negotiable instruments in order to carry out express powers, unless such implied power is absolutely necessary to the accomplishment of the express power. And since the decision in *Brenham v. German American Bank*, *supra*, it can hardly be expected that the Federal courts, when free to follow their own inclination, will hold that a municipal corporation has the implied power to issue negotiable paper under any circumstances.

§ 32. **Summary of the law on the implied power.**—The law of the implied power of municipal corporations to issue their negotiable instruments in order to procure money wherewith to carry out their express powers appears to be :

1. That a municipal corporation has the implied power to issue its negotiable instruments, such as bonds, bills and notes, in order to obtain the money necessary to accomplish some express duty or express authority, when the amount necessary to carry out the same is so large as to indicate that the same was not to be raised by the

slow process of taxation, and it is necessary for immediate use, and there is nothing in the legislative act imposing such duty or granting such authority or in the general laws of the State that would indicate that the money should be raised by taxation, and the implied authority to borrow is not prohibited. This seems to be the general rule of most of the States.

2. In the other States, while under the same circumstances the municipality may not issue its negotiable instruments, yet it may issue its evidence of debt directly to the creditor. Such evidence of debt is not negotiable to the extent of cutting off equities even in the hands of *bona fide* holders.

The decisions on this very vexed and important subject cannot be reconciled, and it is, therefore, important that proposed investors in municipal paper issued under such circumstances carefully ascertain the decisions, on this subject, of the court of last resort of the State in which the municipality is located before investing in such paper, though negotiable in form.

CHAPTER III.

PURPOSE FOR WHICH BONDS MAY BE ISSUED AND THEIR ISSUE COMPELLED.

SECTION.

- 33—A municipal corporation can incur debt for a public purpose only.
- 34—Whether the purpose is public or private, is a question for the courts.
- 35—What purposes are public.
- 36—Distinguishing features between public and private purposes.
- 37—What have been held to be public purposes.
- 38—Railroads are public purposes.
- 39—What are private purposes.

SECTION.

- 40—Bonds and other municipal paper issued for a private purpose are void.
- 41—State constitutions prohibit aid to private enterprises.
- 42—When a municipal corporation may be compelled to issue its bonds or other paper.
- 43—When a municipal corporation cannot be compelled to incur a debt, or issue its paper—Rule laid down by Cooley, J.

§ 33. **Municipal corporations can incur debt only for public purposes.**—It is well settled that a city, town or other municipal corporation, as well as the State itself, can only issue its bonds or other negotiable or non-negotiable paper for public purposes.¹

When a municipality issues its bonds or other evidence of indebtedness, or becomes indebted in any manner, it imposes a burden upon its taxpayers, and their property must pay such indebtedness in the form of a tax, or an assessment in certain cases, and as the constitutions of all the States contain a provision that the private property of their citizens shall not be taken for public use without just compensation, therefore, when a municipality undertakes to become indebted for any purpose, and thus cast a burden upon the private property of its inhabitants, and ultimately to pay the debt from taxes or assessments

¹ *Loan Asso. v. Topeka*, 20 Wall. 1398; *Cooley on Taxation*, chap. 655; *Camden v. Allen*, 26 N. J. L. 14.

collected from such private property, the purpose or object must be a public one, in which the inhabitants of the municipality are interested, and, as said by Chief Justice Black in case of *Sharpless v. Mayor etc. of Philadelphia*, 21 Pa. St. 147 :

“ The Legislature has no constitutional right to create a public debt, or to levy a tax, or to authorize any municipal corporation to do it in order to raise money for a mere private purpose.

“ No such authority passed to the General Assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising money for public purposes. When it is prostituted to objects in no way connected with the general interest or welfare, it ceases to become taxation and becomes plunder.

“ Transferring money from the owner of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional, for all the reasons which forbid to usurp any other power not granted to them.”

§ 34. **Whether the purpose of the law is public or private** is a question of constitutional law to be determined by the court, and this is now the settled rule,¹ although several early cases held that the Legislature was the sole judge of the expediency of such laws.²

It would appear that the rule by which to determine whether a purpose is public or private, that is, one which the Legislature may authorize the levying of taxes, is furnished not so much by the law as by the general consideration of public policy and political economy.³

§ 35. **What purposes are public.**—The Legislature may authorize the issue of bonds for all public purposes, all such purposes and objects as are of a public character and are necessary for conducting the affairs of the municipality, for the general welfare of the inhabitants, or even for their enjoyment and recreation, and these are

¹ *In re Townsend*, 39 N. Y. 171 ;
Burroughs on Taxation, §§ 13, 23,
24.

² *Spring v. Russell*, 7 Me. 273, 292.

³ *Perry v. Keene*, 56 N. H. 514 ;
15 Am. & Eng. Ency. of Law, p.
1241.

public purposes. Such, for instance, as the erection of a city hall, of police stations, of school-houses, fire-engine houses, court-houses, jails, almshouses, insane asylums, hospitals and other municipal buildings, of public libraries; the purchase of lands for such buildings and for parks; the construction of streets and roads, of sewers, of bridges; the purchase of lands for roads; the construction of municipal water, gas or electric works for public use; and the many other public works as well as public necessities required for municipal use.

Sometimes it is a very nice question whether the purpose is public or private, and Mr. Justice Folger, in *Weiss v. Douglass*, 64 N. Y. 91, said on this point: "When we come to ask in any case what is a public purpose the answer is not always ready, not easy to be found.

"It is to be conceded that no pinched or meagre sense may be put on the words, and that if the purpose designated by the Legislature lies so near the border line as that it may be doubtful on which side it is domiciled, the court may not set their judgment against that of the lawmaker."

Mr. Justice Miller, in case of *Loan Assn. v. Topeka*, 20 Wall. 655, said on this subject:

"In deciding whether, in the given case, the object for which the taxes are assessed falls on the one side or other of this line (between public or private purpose), they must be governed mainly by the course and usage of the government, the object for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal.

"Whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."¹

¹ For public purposes, see *Jenkins v. Cheatham*, 43 Ga. 258; 15 Am. & v. Andover, 103 Mass. 94; *Tyler v. Beecher*, 44 Vt. 648; *Wilkinson v.* Eng. Ency. of Law, p. 1246 n.

Chief Justice Black, in the case of *Sharpless v. Mayor of Philadelphia*, *supra*, speaking of the purposes for which taxes could be lawfully levied, has given a comprehensive description of public purposes.

He said: "Taxes may be imposed for roads of all kinds, canals and bridges, that there may be facilities for transportation of freight and for travel; for public schools and colleges, that the people may be educated; for public libraries, that their means of improvement may be increased; for the poor, the dumb, the blind, the insane, lest they suffer from want; for the police of the State, in regulations for the preservation of health or the detection of crime; for courts of law, that individual rights may be protected and enforced, and that crime, when detected, may receive its fitting punishment; for the preservation of peace and the protection of the country from foreign enemies; to aid, encourage and stimulate commerce, domestic and foreign, by the establishment of mints, postage system and maintaining navies to keep open the highways of nations; to encourage citizens in the defence of their country, by suitable rewards and mementoes for past services in times of war, or by bounties for enlistment for future services; and for the promotion of arts and sciences."

Where the statute of some of the States permits municipalities to aid in the construction of any railroad or other work of internal improvement, it has been repeatedly held that such authority does not include public buildings.¹ And where the statute of some of the States authorizes municipalities to issue bonds in aid of any "internal improvements," such general authority has been held to authorize the issue of bonds for a toll bridge,²

¹ *Dawson Co. v. McNamar*, 10 Neb. 276; *Lewis v. Sherman Co.*, 5 Fed. Rep. 269. Where a municipality was authorized to incur an indebtedness for any municipal improvement with the consent of the voters, it was held under

² *Dodge Co. Com'rs v. Chandler*, 96 U. S. 205.

waterworks for the city,¹ and even for aid to a water-power for a grist mill.²

In this latter case, it is difficult to understand how the purpose can be deemed to be a public one, because the inhabitants at large of the municipality have no common interest in the purpose, and the benefit or aid is given to the owners of the mill alone.

§ 36. **Distinguishing features between public and private purposes.**—While no definition can be given that will exactly distinguish those purposes which are public from those that are private, it may safely be said that the purpose is public when all the inhabitants are interested in the work, as public schools, where the children of any inhabitant may attend ; libraries, because for the education of the people, and open to all alike ; waterworks controlled by the municipality, because every resident may have water ; almshouses and insane institutions, because open to all who are unfortunate enough to require their aid or care, likewise hospitals for same reason ; electric and gas works, because necessary to light the public streets and institutions, and enjoyed by all the inhabitants ; police and fire departments, as well as the necessary buildings to house and localize them, for the protection and convenience of the public ; courts to enforce the law ; and so one can enumerate all the known public conveniences and necessities to be found in a city, county and town ; but in all the public works or purposes it will be found that the municipality has the care and supervision of the same, and that the humblest citizen is entitled to the same enjoyment, or same care and protection, and in the same respect, as the most influential. The distinguishing feature between a private and a public work or purpose is that, in the former case, the supervision and gains are vested in, and received by, but a few of the inhabitants, and sometimes by non-residents of the municipality, while in a public work or purpose the care and

¹ State v. Babcock, 19 Neb. S. 363. See *contra*, Osborne Co. v. 230.

Adams, 106 U. S. 181.

² Blair v. Cumming Co., 111 U.

supervision are lodged in public officers, and the gains, if any, belong to the municipality.¹

§ 37. **What have been held to be public purposes.**—The issue of bonds or the levy of taxes for the following purposes have been held to be for public purposes. Highways and streets,² toll bridges,³ public bridges,⁴ sewers in cities and towns,⁵ waterworks,⁶ providing for fire engines,⁷ public buildings,⁸ cemeteries and parks,⁹ construction of drains to promote health,¹⁰ bounty offered to encourage enlistment,¹¹ schools and colleges,¹² docks and wharves,¹³ charitable institutions under control of private persons, if municipalities can send persons there for care,¹⁴ gas and natural gas works,¹⁵ grading for drainage for public health,¹⁶ drainage for swamp lands for same purpose,¹⁷ a public grist-mill, and improving water-power of a river.¹⁸ See cases cited in Sedg. on Const. of Stat. & Const. Law, pp. 446–7 *et seq.*

§ 38. **Railroads are public purposes.**—It is the now well settled doctrine that municipalities may, when authorized by statute, and not restrained by the State constitution, issue their bonds to aid in the construction of railroads and canals, either by way of donation or by subscribing for stock. This is upon the ground that railroads and canals are indispensable to the public interests and public purposes, and therefore the power of eminent domain may be

¹ Railroads and canals are held to be public purposes, and seem to be the only exception to this rule. See § 38.

² *People v. Brooklyn*, 4 N. Y. 420.

³ *Dodge v. Chandler*, 94 U. S. 205.

⁴ *Union Co. v. Colfax Co.*, 4 Neb. 450.

⁵ *State v. Jersey City*, 1 Vroom, 148.

⁶ *Rome v. Cabot*, 28 Ga. 50.

⁷ *People v. Breshire*, 80 Ill. 423.

⁸ *Greely v. People*, 60 Ill. 49.

⁹ *Park Com'rs v. Detroit*, 28 Mich. 228.

¹⁰ *Tide Water Co. v. Coster*, 3 C. E. Gr. (N. J.) 518.

¹¹ *Booth v. Woodbury*, 32 Con. 128.

¹² *Merrick v. Inhabitants of Amherst*, 12 Allen, 500.

¹³ *Eaton R. R. Co. v. Central R. Co.*, 52 N. J. L. 267.

¹⁴ *Shepherd's Fold v. New York*, 7 Am. & Eng. Corp. Cas. 387.

¹⁵ *Bloomfield C. Co. v. Richardson*, 63 Barb. 417.

¹⁶ *Dingley v. Boston*, 100 Mass. 544. D.

¹⁷ *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *People v. Kearing*, 6 Vr. (N. J.) 497.

¹⁸ *Blair v. Cumming Co.*, 111 U. S. 363.

exercised and private lands taken for their corporate purposes, and further, because the municipality granting such aid receives or is supposed to receive a peculiar benefit from their construction, and because the object to be accomplished is so obviously connected with the municipality and its interest, as to conduce in a special manner to its prosperity and advancement.¹

§ 39. **What are private purposes.**—The Legislature cannot grant authority to a municipality to issue bonds in aid of a private enterprise. Although the object may be a most commendable one, such as to relieve or aid a large number of citizens who may have been ruined by disaster, such as a conflagration or an epidemic,² or to aid in the erection of mills or other private buildings,³ or by the erection of a building to be used in part by a private organization.⁴

The policy of the law is against the support of private enterprises by the State, or any of its component parts, and prohibits the aid of municipalities as a partner or otherwise in purely private ventures.⁵

§ 40. **Bonds issued for private purposes are void.**—The Legislature has no right to authorize or compel a municipality to levy taxes to be used in aid of a manufacturing enterprise of any kind, conducted by a private corporation, or by individuals, or any other private enterprise, and therefore any law which permits the issue of bonds or other paper for such purpose is invalid, and the bonds or other paper are void in the hands of even a *bona fide* holder.⁶

Mr. Justice Miller, in *Loan Asso. v. Topeka*, said : “ To

¹ See subject, *Railroad Aid Bonds*, § 267 *et seq.*

² *Fieldman v. Charleston*, 15 Am. & Eng. Corp. Cas. 343; *Lowell v. Boston*, 11 Mass. 463; *State v. Osawkee*, 14 Kan. 418.

³ *Wessmer v. Jay*, 64 N. Y. 61.

⁴ *Kingman v. Brockman*, 26 N. E. R. 998.

⁵ For reference to a number of cases on this subject, see Vol. XV.

Am. & Eng. Ency. of Law, p. 1231; *Coates v. Campbell*, (Minn.) 18 Am. & Eng. Corp. Cas. 429; *Parkersburgh v. Brown*, 2 Am. & Eng. Corp. Cas. 263; *Mather v. Ottawa*, (Ill.) 11 Ib. 248.

⁶ *Loan Asso. v. Topeka*, 20 Wall. 655; *Broadhead v. Milwaukee*, 19 Wis. 624; *Ottawa v. Carey*, 108 U. S. 110. See also cases last cited.

lay with one hand the power of the government on the property of the citizen, and with the other, to bestow it upon favored individuals, to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called 'taxation.' This is not legislation, it is a decree under legislative forms."

In the case of *Allen v. Inhabitants of Jay*, 60 Me. 124, the town, under an enabling act of the Legislature, issued its bonds in the sum of \$10,000, for the encouragement of a manufacturing firm in the town; the bonds were declared to be invalid because issued for a private purpose.

Mr. Justice Appleton, who delivered the opinion of the court, said: "If there is any proposition about which there is entire and uniform weight of judicial authority, it is that taxes are to be imposed for the use of the people of the State in varied and manifold purposes of government, and not for private objects, or the special benefit of individuals. Taxation originates from and is imposed by and for the State. The town of Jay stands in the same relation to this new mill as to all others, as far as regards any public benefit to be derived therefrom.

"All labor conduces to the public benefit, but because all labor, all productive industry, conduces to the public benefit, does it follow that the people are to be taxed for the benefit of one man, or of one special kind of manufacturing? The sailor, the farmer, the mechanic, the lumberman are equally entitled to coerced loans, to enable them to carry on their business with Messrs. Hutchings and Lane (the persons aided). Our government is based upon equality and right. The State cannot discriminate among occupations, for a discrimination in favor of one is a discrimination in favor of all others."

In *Parkersburg v. Brown*, 106 U. S. 487, Blatchford, J., in holding bonds issued to aid a private enterprise void, said: "There having been a total want of power to issue the bonds originally under any circumstances, and not a mere failure to comply with the prescribed requirements or conditions, the case is not one for applying to the city under any state of facts any doctrine of estoppel or ratification,

by reason of its having paid some instalments of interest on the bonds, or by reason of any of the acts of its officers or agents in dealing with the property covered by the trust deed. No such acts can give validity to the statute or to the bonds, however they may affect the property dealt with, or the relation of the city to such property."

In this case the Legislature of West Virginia authorized the city of Parkersburg to issue its bonds to aid persons in a manufacturing company.

In the case of *Hackett v. Ottawa*, 99 U. S. 86, bonds, although issued to aid in a private enterprise, were held valid because they appeared on their face to have been issued for municipal purposes, and passed into the hands of innocent purchasers for value without notice of their true object.¹ The effect of recitals, when the face of the bonds recite their purpose, is further treated in another part of this work.²

§ 41. **State constitutions prohibit aid in private enterprises.**—The constitutions of the following named States prohibit counties, towns and municipal corporations from giving money or other property to any individual or private corporation whatever, viz.: New York, New Jersey, New Hampshire, Pennsylvania, Ohio, Indiana, Illinois, Wisconsin, Missouri, Texas, Arkansas, Oregon, California, Georgia, Alabama, Florida, Louisiana and Colorado.

The constitutions of the following States prohibit counties, towns and municipal corporations from loaning money or credit to private corporations, viz.: All the States above named except Wisconsin. The prohibition is also found in the constitutions of Tennessee and Nevada.

The constitutions of New Jersey, New Hampshire, Louisiana, Colorado and California prohibit counties, towns and municipal corporations from becoming a surety, and the constitutions of all the States named

¹ See also *Ottawa v. Carey*, 108 U. S. 110-118.

² See §§ 217, 218, 219.

prohibit municipal corporations from becoming stockholders in private corporations.

It is held that when the constitutional prohibitions prohibit the Legislature of the State from authorizing counties, towns and municipal corporations to aid private enterprises in any manner whatsoever, the statutes in existence relating to such powers by municipal corporations are not repealed, and that the effect of the adoption of such a prohibitory constitution is prospective;¹ but if the constitution itself prohibits the municipal corporation from lending its aid or becoming interested in a private enterprise, such prohibition takes effect at once, and all statutes authorizing such aid and in conflict with the constitutions are immediately repealed, unless private rights have become vested thereunder.²

§ 42. **When a municipality may be compelled to issue its bonds or other paper.**—A municipal corporation may be compelled by the Legislature, unless restrained by the constitution, to issue its bonds for the settlement of its indebtedness,³ when it has become indebted for some public work, even though the work was done without authority, but the Legislature cannot compel the municipality to pay a claim which the city is under no moral obligation to pay,⁴ although it may compel the payment of a claim, or the issue of bonds to pay the same, when the municipality is not legally liable for it and the same is not enforceable at law.⁵

The corporation may also be compelled to issue its bonds for the construction of work, where the work sought to be compelled to be done is of a public nature, in which not only the inhabitants of the municipality but those of the State at large are interested. Such, for instance, as the building of a bridge or of a highway for the

¹ Sweet v. Syracuse, 27 N. E. R. Co., 13 N. Y. 143; New Orleans v. 1081; Gillman v. Davis Co., (Ky.) Clarke, 95 U. S. 654.

11 A. W. R. 838; Red Rock v. Henry, 106 U. S. 596.

² Kelly v. Milan, 127 N. S.; Aspinwall v. Com'rs, 22 How. 464.

³ Town of Guilford v. Chenango

⁴ Blanding v. Burr, 13 Cal. 343; 1 Dill. Mun. Corp. § 75 (4th ed.).

⁵ O'Hara v. State, 102 N. Y. 146; New Orleans v. Clark, 95 U. S. 634; Am. & Eng. Ency. Law, vol. 15, p. 1248.

convenience of the travelling public; of sewers, or a system of drainage for the protection of the health of the inhabitants, and also of the surrounding country.¹

§ 43. **When a municipal corporation cannot be compelled to incur debt.**—A municipal corporation cannot be compelled to aid a railroad against its will.² When, however, a municipality acts under a compulsory statute which commands the doing of a work in which the public at large, those outside of the municipality, are not interested, the act is construed as permissive, and the bonds issued to carry out the purposes of the act are valid.³

A municipality cannot be compelled to purchase or contract for, or issue its bonds for, or become indebted for, local conveniences, such as water, electric or gas works, public buildings, libraries, parks and like purely local matters, in which the inhabitants of the municipality are alone interested.⁴ In all such instances the municipality is to be regarded as a constituent, and the Legislature has no more right to compel it to incur such a debt or make such an improvement than it would have to compel a private individual to do so. It, of course, may permit such improvement, but cannot compel them.⁵

The able opinion of Cooley, J., in the *Detroit Park Case*, *People ex rel. Park Commissioners v. Common Council of Detroit* (on *mandamus* to compel the council to raise money to pay for lands for the park), 28 Mich. 228, fully illustrates the general doctrine of the courts on this subject, in which he in part said :

“ In all matters of general concern there is no local right to act independently of the State . . . and the

¹ *People v. Flagg*, 46 N. Y. 401 ; ⁴ *People v. Batchellor*, 53 N. Y. Dill. on Mun. Corp. (4th ed.) § 73 ; 128 ; *Aitken v. Town of Randall*, Perry v. Keene, 56 N. H. 514 ; 31 Vt. 226 ; Dill. Mun. Corp. Ch. Cooley on Taxation (2d ed.) 688. IV. ; *People v. Mayor of Chicago*,

² *People v. Batchellor*, 53 N. Y. 51 Ill. 17 ; 15 Am. & Eng. Ency. of 128. See, however, *Langhorne v. Law*, 991 and 1248.

³ *Scott*, 20 Gratt. 661. ⁵ *Western Sav. Fund Soc. v.*

⁴ *Williams v. Duaneburgh*, 66 Philadelphia, 31 Pa. 183 ; *Cooley* on Const. Lim. 230-1. See *Black's* 77 Ill. 505. Constitutional Law, § 118.

State may exercise compulsory authority, and enforce the performance of local duties, either by employing local officers for the purpose, or through agents or officers of its own appointment. . . . The proposition which asserts the amplitude of legislative control over municipal corporations, when confined, as it should be, to such corporations as agencies of the State in its government, is entirely sound. They are not created exclusively for that purpose, but have other objects and purposes peculiarly local, and in which the State at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens. Indeed it would be easy to show that it is not from the standpoint of State interest, but from that of local interest, that the necessity of incorporating cities and villages most distinctly appears.

It is a fundamental principle in the State, recognized and perpetuated by express provision of the constitution, that the people of every hamlet, town and city of the State are entitled to the benefits of local self-government. But authority in the Legislature to determine what shall be the extent of the capacity in a city to acquire and hold property is not equivalent to, and does not contain within itself, authority to deprive the city of property actually acquired by legislative permission.

And when a local convenience or need is to be supplied, in which the people of the State at large, or any portion thereof outside the city limits, are not concerned, the State can no more by process of taxation take from the individual citizens the money to purchase it, than they could, if it had been procured, appropriate it to the State use. . . . From the very dawn of our liberties the principle most unquestionable of all has been this: that the people shall vote the taxes they are to pay, or be permitted to choose representatives for the purpose."

CHAPTER IV.

POWER OF MUNICIPAL OFFICERS—BOARDS AND COMMISSIONS—FRAUD AND IRREGULARITY OF PUBLIC OFFICERS.

SECTION.

- 44—Where authority of public officers must be found.
- 45—Persons dealing with them must ascertain their authority.
- 46—Acts of *de facto* officer, who are such.
- 47—When no legal office there can be no *de facto* officer.

SECTION.

- 48—Boards and commissions, their powers to issue municipal paper.
- 49—Misconduct, fraud, irregularity of municipal officers—Effect of.
- 50—When the corporation will be bound by the acts of its officers.

§ 44. **Where authority of public officers must be found.**—The authority of a municipal officer to bind the corporation, especially by executing bonds and other instruments for the payment of money, must be found in the charter of the municipality, or in some other legislative enactment, or in the proceedings of the municipality itself. In fact the same may be said of every public officer, and persons dealing with a public officer must take notice of the extent of his powers at their peril.¹

The authority of public officers being created by law, or being a matter of public record, of which every person interested is bound to take notice, it is presumed that all persons having occasion to deal with them have notice of their authority, and it is not enough, therefore, for such persons to rely upon any mere presumption as to the officers' authority, but they must see to it that it is in fact sufficient for the assumed purpose.² The powers of public officers can be ascertained. They are matter of public record, to be found in either the statutes or the proceedings of the municipalities; the powers of private

¹ Bissel v. Spring Valley, 110 U. S. 162.

² Mechem on Public Officers, § 506.

agents cannot always be ascertained ; they are known to the principal and agent alone ; therefore, a private agent may bind his principal against his will, although by so doing he violates specific instructions, provided the act done be within the general scope of the agent's authority. The principal in such cases is bound, because third persons, acting in ignorance of the violation, have been induced to enter into a contract and have acquired vested rights. But persons dealing with public agents do not acquire any right, if it turns out that the public agent exceeded his authority or acted without authority.

As said by Loring, J., in case of *Pierce v. United States*, 1 Nolt & H. 270 : " By the law of agency, at the common law, there is this difference between individuals and the government : the former are liable to the extent of the power they have apparently given their agents, while the government is liable only to the extent of the power it has actually given to its officers."

In *Anthony v. Jasper Co.*, 101 U. S. 693, Chief Justice Waite said : " The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties.

" The authority of a public agent depends upon the law as it is when he acts.

" He has only such powers as are specifically granted. Purchasers of municipal securities must always take the risk of the genuineness of official signatures of those who executed the paper they buy."

§ 45. **Persons dealing with municipal officers must ascertain their authority.**—Without further enlarging upon this subject, it will be sufficient to say that whoever deals with public officers, or in fact with a municipal body, must ascertain for himself, and at his peril, that the officers or body have the power to do the act they assume to do, and if it turns out that the act done was unauthorized, and if the act was the issue of bonds or other evidence of municipal indebtedness, the loss will fall upon the holder of such instrument, and no recitals

will estop the municipality to show this want of power.¹

§ 46. **Acts of de facto officers who are such.**—A *de facto* officer is one who is in office by some color of right, as where he has been appointed or elected and has failed to conform to some condition or requirement, as to take an oath, give bonds, or the like; where he holds office under a known election or appointment, but is not eligible, or the appointment was irregularly made; and even when he holds office without a known appointment or election, but exercises the duties of such office and induces people to submit to or invoke his action; or where he holds office under color of an appointment or election by, or pursuant to, an unconstitutional law, before it is declared to be unconstitutional; or where he holds over after his term.² It is the color of right that distinguishes the *de facto* officer from the mere intruder, who is one who, without lawful title, without an appointment or election to the office, without color of right to it, enters upon the office and assumes to act. His acts are void.³

§ 47. **There can be no officer de facto where there is no legal office,** and this point was raised and settled in the United States Supreme Court in the case of Norton v. Shelby County, 118 U. S. 425. Under an act of the Legislature of Tennessee power was given to the county courts to issue bonds to aid railroads. Before the power was executed in this particular case, another act was passed which abolished the county courts and vested its power, including the issue of these bonds, in a board of commissioners; the bonds in the suit were issued by the board, and afterwards the Supreme Court of the State held the act abolishing the county court and establishing in its stead the board of commissioners, to be unconstitutional. The Supreme Court of the United States, in

¹ Bissell v. Spring Valley, 110 U. S. 162; Coler v. Cleburne Co., 131 U. S. 162; Merchants' Bank v. Hamlin, 115 U. S. 284; Brown v. Bon Homme Co., 46 N. W. R. 173; Travellers' Ins. Co. v. Oswego, 55 Fed. Rep. 361.

² State v. Carrol, 38 Conn. 419; Wilcox v. Smith, 5 Wend. (N. Y.) 231; Kassaffer, 15 Oregon, 456.

³ McCraw v. Williams, 33 Gratt. 519.

the suit on the bonds, held them to be void because, as there was no office, no such board of commissioners, the act establishing the board being unconstitutional, there could be no officer *de facto*. The court said: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never passed."

Although there can be no *de facto* officer where there is no legal office, yet there can be a *de facto* officer though he hold office under an unconstitutional act, if there be a legal office.¹

The title of a *de facto* officer cannot be attacked collaterally, nor can the validity of his acts be questioned in proceedings to which he is not a party.²

The acts of *de facto* officers are as binding upon the corporation, if done within the scope and apparent authority of the officer, as if done by an officer legally elected and qualified for the office and in full possession of it;³ and the same principle extends to a *de facto* council or other legislative body of a municipal corporation, and bonds issued by such a body are valid.⁴

§ 48. **Boards and commissions.**—Very often boards or commissions are established by law in large cities, for the purpose of placing the control of certain departments of the municipal government, as the educational department, the control of parks, of wharfs, of the police, and of street improvements and the like, in the hands of such board or commission, and the acts establishing such board or commission often authorize them to borrow money and give evidence of debt in either the city's corporate name or in that of the board or commission. Such acts are constitutional, and if the authority so given

¹ Cole v. Black River Falls, 57 Wis. 110.

² Stockle v. Silsbee, 41 Mich. 615; Plymouth v. Painter, 17 Conn. 585.

³ Mechem on Public officers, § 328, and cases cited. Coler v. Dwight Tp., 55 N. W. R. 587.

⁴ National Life Ins. Co. v. Board of Ed., 62 Fed. Rep. 773; Decorah v. Bullis, 25 Iowa, 12; People v. Bartlett, 6 Wend. (N. Y.) 422; Scoville v. Cleveland, 1 Ohio St. 126.

is broad enough in scope and the enabling act constitutional in form and purpose, bonds or other evidence of corporate debt issued by such a board or commission are as valid as if issued by the legislative body of the city, and are controlled by the same general rules of law.¹

These boards or commissions are corporations created for municipal purposes,² although they are not usually regarded as embraced within the term "municipality," or "municipal corporations;"³ but it has been held that where a park commission was endowed with power to sue and be sued, and have a corporate seal, pass ordinances, employ a police force, levy taxes, and generally to perform all municipal powers necessary to maintain the parks of a city, that such a corporation was a municipal and not a *quasi*-municipal corporation.⁴

Often the statute pursuant to which the board or commission is appointed, or some general or special act, requires the legislative body of the municipal corporation to issue bonds, the proceeds thereof to be placed to the credit of such board or commission, or turned over to it, to be expended for the public purposes under its charge. Usually these statutes are so drafted that the board or commission designates the amount it deems necessary for some special public improvement under its charge, and the legislative body is then required to issue the bonds to obtain the money, and if they refuse, *mandamus* will lie to compel the legislative board to issue and sell the bonds and pay over the proceeds.

§ 49. **Misconduct, fraud or irregularity of municipal officers.**—While it is a general rule that municipal corporations are not bound by the torts of their officers, nor by their acts done *ultra vires*, yet when the servants or agents of such a corporation act within their general powers, the municipal corporation, like a private person

¹ Fitzgerald v. Walker, (Ark.) 55 Ark. 148; Orvis v. Board of Park Com'rs, Des Moines, 56 N. W. R. S. W. R. 702; 55 Ark. 148, 249; West Chicago Park Com. v. Chicago, 152 Ill. 392. ² Dill, on Mun. Corp. (4th ed.) § 49. ³ Fitzgerald v. Walker, (Ark.) 17 Ark. 148. ⁴ West Chicago Park Com'rs, v. Chicago, 152 Ill. 392.

or corporation, is bound by such acts.¹ The fraud, misconduct or irregularity of municipal officers or agents cannot be set up as a defence against a *bona fide* holder of municipal bonds.²

It is a general rule that when the agent has authority, a person dealing with him will be protected from the irregularities of the agent, when the act is done within the general scope of the agent's power.

It being shown by other evidence that the agency existed, and that the act was done within the general scope of the power, the principal is bound by the representations of the agent, the truth or falsity of which the party dealing with him had no certain means of ascertaining.³ Where the statute authorizing commissioners to issue certain bonds, provided further that but ten per cent should be made payable each year, and in point of fact more than that amount was made payable, the court held that a *bona fide* holder was not bound by the acts of the commissioners in this respect, and that he had the right to assume that the officers would act as required by law, and that he was not bound to examine the entire series, if such a thing were possible, to see that no more bonds were issued in a single year than the statute permitted.⁴

§ 50. **When the corporation will be bound.**—When the municipal corporation leaves it to its officers or agents to carry out certain provisions or certain instructions, or to do certain acts in the issue of the bonds, and the officers or agents either neglect or intentionally avoid carrying out such instructions, or for any reason disobey them, and these facts were not known to the person dealing with them, and are not ascertainable from the face of the paper, or the records or statutes together or singly, the corporation cannot set up such failure as a defence

¹ Meehan on Public Officers, § Railroad Co. v. Otto Co., 1 Dill. 853. ² 338; Black v. Cohen, 52 Ga. 621;

³ Ceder v. Board of Co. Com'rs, Maxey v. Williamson, 72 Ill. 207. ⁴ Gould v. Sterling, 23 N. Y. 458.
27 P. R. 619; Town of East Lincoln v. Davenport, 94 U. S. 801; John- ⁵ Brownell v. Town of Greenwich,
son Co. v. Thayer, 91 U. S. 631; 114 N. Y. 518, 530.

against the *bona fide* holder of bonds or other negotiable paper, although the original payee or holder may have known the facts. Each holder for value before maturity of such paper has the right to presume that the officers or agents have carried out their instructions and performed the duties imposed upon them.

Where the county judge of a county in Iowa went to New York City and there signed and sealed, with the corporate seal of the county, the bonds of the county which he was authorized to do at home, the court held that such an irregularity did not affect the bonds in the hands of a *bona fide* holder.¹

And in another case, where bonds were issued with the express condition that they should not be sold for less than par, the court held that the bonds, although sold contrary to such directions, were not affected thereby in the hands of a *bona fide* holder.²

As said before, mere irregularities in the issue of the bonds, if negotiable, do not affect them in the hands of a *bona fide* holder. And where a city had authority "to borrow money for any public purpose," the council issued its bonds as a loan to a railroad, under an ordinance which was recited in the bonds, the court held the bonds to be valid, although the defence was that the bonds were loaned to the railroad company and the city did not borrow any money, that the action was a mere irregularity, and that the purchaser loaned his money, and that it was immaterial that the bonds were first offered in the market by the railroad company instead of the city officers.³

¹ Lyndev. The County, 16 Wall. 6. ³ Rogers v. Burlington, 3 Wall.

² Mercer Co. v. Hackett, 1 Wall. 654.

CHAPTER V.

LIMITATION OF DEBT.

SECTION.

- 51—Limitation, where to be found, why imposed.
- 52—Effects of prohibition when directed to the Legislature.
- 53—Effect when directed to a municipal corporation.
- 54—Persons dealing with a corporation to take notice of limitation.
- 5—Indebtedness defined.
- 56—Basis of calculation.
- 57—What should be included.
- 58—How taxes may be appropriated after limitation reached.

SECTION.

- 59—What is to be excluded in the calculation.
- 60—Contracts, for more than one year, to be excluded, cases.
- 61—*Contra* view, cases.
- 62—Liabilities *ex delicto* are to be excluded.
- 63—Effect, if limitations exceeded, bonds and other paper void—Taxpayer may enjoin collection of bond or levy of stock.
- 64—How the limitation is to be construed.

§ 51. **Limitation, where found, why imposed.**—To prevent the incurring of large indebtedness by municipal corporations, and the hasty and often injudicious expenditure of public moneys, and to act as a check upon municipal extravagance, almost all of the States have been compelled to provide that municipalities shall not issue bonds or incur debts beyond a certain limit. This limitation is to be found, either in the constitution of the State, or in some general or special law, or in the charter of the municipality itself. In order to curtail the almost unlimited power of the Legislature over municipal corporations to authorize them to incur debt or issue bonds, or to permit them to indulge in extravagant and often wholly unnecessary expenditures, the people of a number of the States have, by constitutional amendments, limited the municipality directly, or limited the power of their respective Legislatures, as to the amount they could authorize municipal corporations to expend, as well as

restricted them as to the objects for which the municipalities could incur any indebtedness.¹

The constitutions of Illinois, Maine, Iowa, Wisconsin, Missouri and West Virginia forbid municipalities to become indebted to an amount exceeding five per cent. of their assessed valuation. In Pennsylvania and Georgia the limit is seven per cent ; in New York ten per cent, in Indiana two per cent, in South Carolina eight per cent, Colorado three per cent, and in some of these certain exceptions are made.

In Oregon no county can incur debt exceeding \$5,000, except to repel invasion or to suppress insurrection ; in Indiana the limit may be exceeded in order to provide for the people in time of great public calamity ; in Missouri, to erect a court-house ; in New York, a jail, and to issue bonds for a water supply. In California, Missouri and Georgia a municipality cannot contract any debt, other than a temporary one, without the assent of two-thirds of its voters ; in West Virginia without three-fifths, and in Colorado without a majority. The territories of the United States are limited to four per cent on the value of taxable property of the corporation, county or subdivision thereof.²

§ 52. Effect of prohibition when directed to the Legislature.—When the constitution imposes the prohibition upon the Legislature, and prohibits it from authorizing municipal corporations or other subdivisions of the State or the State officers from incurring indebtedness beyond a certain amount, such constitutional prohibition does not repeal any existing powers which

¹ The decisions of the courts of the State wherein the municipal corporation is situate should be consulted, in all questions relating to the limitation upon the power of the corporation to incur a debt, because such decisions are based upon the peculiar statutory or constitutional prohibition of the State : therefore no other safe rule can be laid down, and, as it is impossible to give, in a work of this nature,

all the decisions of the courts of the respective States, it is not attempted. The question is treated generally, and those features which are peculiar to no particular State are given, or if given are so referred to.

² Public Act No. 159, 49th Congress, July, 1886. See the extracts from the State constitutions at end of volume.

have been vested by prior statute.¹ When a statute authorizes the issue of bonds or other paper and the levy of a tax to pay for them, and prior to their issue the people adopt a constitutional amendment limiting the amount of indebtedness which the Legislature might authorize municipalities to incur, the municipality has authority to issue the said bonds or other paper, and the constitutional amendment does not affect their validity.²

Where a municipality has authority to subscribe for stock and issue bonds, and a subscription is made and the bonds are ordered to be issued, and before their issue a constitutional amendment is adopted prohibiting the Legislature from authorizing municipalities to subscribe for stock or lend its aid to a railroad, such bonds may still be issued and are valid.³

In both cases the constitutional limitation curtails the future acts of the Legislature and does not affect the power the municipality had when the constitutional limitation was adopted.

§ 53. **Effect when directed to a municipal corporation.**—When the prohibition applies directly to the municipality, it repeals immediately so much of its existing powers as is in conflict with the constitutional prohibition,⁴ but such a prohibition will not affect vested rights or executed contracts, or invalidate bonds already issued, or in any manner affect indebtedness already incurred, although all such exceed the subsequent statutory or constitutional limitation.⁵

The adoption of a constitutional provision, or the passage of an act of the Legislature which limits the amount of indebtedness a municipality may contract, is inconsistent with, and repeals, charter provisions conferring unlimited power of contracting indebtedness, and

¹ *Cass v. Dillon*, 2 Ohio St. 607; 655; *East St. Louis v. Amy*, 120 U. S. 600.

² *Moultrie Co. v. Fairfield*, 105 U. S. 370. ⁵ *Scott v. Davenport*, 34 Iowa. 298; *Moultrie v. Rockingham Bank*.

³ *Moultrie Co. v. Rockingham*, 92 U. S. 631; *Board v. Bolton*, 104 Ill. 220.

⁴ *East St. Louis v. People*, 124 Ill.

the fact that the municipality was indebted in excess of the limit so fixed at the time does not change the rule. While the prior indebtedness is not affected the city cannot add thereto.¹

When the limit is fixed by statute, bonds issued pursuant to a special power conferred by a subsequent act are valid, as the latter statute operates to extend the power of the city to contract debts beyond the limit fixed in the former statute.²

When the constitutional limitation declares that "no debt whatever shall hereafter be created by or on behalf of the State," the provision applies simply to the State, and not to its subdivisions.³

§ 54. **Persons dealing with the corporation to take notice.**—The question whether a municipal corporation is exceeding the limitation of its indebtedness is cast upon the person dealing with the corporation. He must ascertain for himself whether or not the proposed debt will cause the municipality to exceed the constitutional or statutory limitation,⁴ but the burden of proof is upon the taxpayer in an action to restrain the issue of bonds alleged to be in excess of the debt limitation.⁵ If the limitation of indebtedness is exceeded the debt cannot be enforced,⁶ except the corporation be estopped by proper

¹ Scott v. Davenport, 34 Iowa, 208.

² Amey v. Allegheny City, 24 How. (U. S.) 364; Horby v. Beverly, 3 East. Rep. 888.

³ Cass v. Dillon, 2 Ohio St. 607.

⁴ Doon v. Cummings, 142 U. S. 366; Buchanan v. Litchfield, 102 U. S. 278; Atlantic City Water Works v. Read, 50 N. J. L. 665.

⁵ Linn v. Chambersburgh Borough, 160 Pa. St. 511.

⁶ Law v. People, 87 Ill. 385; Appeal of City of Erie, 91 Pa. St. 398; French v. Burlington, 42 Iowa, 614; Hebard v. Ashland Co., 55 Wis. 145; Baltimore v. Gill, 31 Md. 325.

stitution relating to the limit of indebtedness is as follows:

"No municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount in the aggregate exceeding five per cent on the value of the taxable property within such corporation, to be ascertained by the last State and county lists previous to the incurring of such indebtedness." Art. xi, § 3.

Of this, the court in Scott v. Davenport, 34 Iowa, No. 8, said:

"The language of the constitution is broad and sweeping. . . . It includes all debts incurred in any manner or for any purpose. It says in effect that whenever the corpo-

recitals or its record, and the limitation is imposed by statute.¹

It seems to be now well settled that the prohibition of indebtedness applies to all forms of debt over which the municipality has control, both express and implied, and to floating as well as bonded indebtedness.²

§ 55. **Indebtedness defined.**—Indebtedness of a municipality is defined in the well considered case of *Sackett v. City of New Albany*, 88 Ind. 473, as follows: "By indebtedness in this connection we mean an agreement of some kind by the city to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement. It was obviously the intention of the Legislature in submitting, and the people in adopting, the thirteenth article of the constitution to arbitrarily restrict the power of municipal corporations to contract debts to a limited per centum of their taxable property, and to require, when that limitation has been reached, that such corporations shall be prepared to pay for whatever value they may obtain without the inconvenience of any further indebtedness for any purpose whatever."

§ 56. **Basis of calculation.**—The assessment of the local assessors for the purpose of taxation is made the basis by either the constitution or statute for determining the limit of indebtedness, and the last regular assessment made preceding the incurring of the debt must be used,³ unless otherwise ordered, and a second assessment for the issue of bonds, unless authorized, is void.⁴

Where the constitution prohibits a municipality from becoming indebted beyond the income and revenue pro-

rate indebtedness in the aggregate shall amount to five per cent on the taxable property within the corporation, no further indebtedness shall be allowed to be created in any manner or for any purpose."

¹ See subject, *Estoppel by Recitals*, herein, § 221 *et seq.*

² *Litchfield v. Ballou*, 111 U. S. 190; *Davenport v. Kliensschmidt*, 6

Mont. 502; *People v. May*, 9 *Colo.* 80; *Council Bluffs v. Steward*, 51 *Iowa*, 385; *Am. & Eng. Ency. of Law*, Vol. 15, 1125.

³ *Cullberson v. Fulton*, 127 *Ill.* 30; *Wilkinson v. Van Orman*, 70 *Iowa*, 230.

⁴ *State v. Folly*, (S. C.) 16 *S. E. R.* 195.

vided for a year, it means income derived from any source, and not that derived from taxation alone.¹

The valuation or assessment to be used as the basis of calculation is that fixed by the city officers for city purposes, and not that determined by the county officer for county purposes.² Although there be some irregularities in the assessment, as where it is not filed within the proper time, yet if the authorities accept it and act on it, it will be regarded as valid and sufficient to be used as a basis of calculation.³

§ 57. **What should be included.**—It is now generally held the fees and salaries of the officers of the municipality and other compulsory debts should be included when calculating the debt, to ascertain whether the proposed debt will exceed the limitation of indebtedness. The principal case on this point is that of *Lake Co. v. Rollins*, 130 U. S. 662.

In this case the suit was upon the warrants of the county issued for fees and salaries of its officers, and issued after the limit prescribed by the State constitution of Colorado had been reached and exceeded by the county of Lake. The court below held that while the power of the county to incur other debts by contract was suspended, the liability for further amounts, in the shape of fees and salaries and other compulsory obligations imposed by the will of the Legislature remained, and was enforceable, and gave judgment against the county.

The Supreme Court, in an opinion by Mr. Justice Lamar reversing this decision, said, in part: "Neither can we assent to the position of the court below that there is, as to this case, a difference between indebtedness incurred by contracts of the county and that form of debt denominated 'compulsory obligations.'

"The compulsion was imposed by the Legislature of the State, even if it can be said correctly that the compulsion was to incur a debt; and the Legislature could no more

¹ *Lamar W. & E. L. Co. v. City of Lamar*, 31 S. W. R. 756.

² *Bruce v. Pittsburgh*, 166 Pa. St. 152.

³ *Atlantic T. Co. of N. Y. v. Darlington*, 63 Fed. Rep. 76.

impose it than the county could voluntarily assume it as against the disability of a constitutional prohibition. Nor does the fact that the constitution provided for certain county officers and authorized the Legislature to fix their compensation and that of other officials affect the question."

This case has been followed in a number of the States, and now seems to be the general doctrine.¹

In estimating the amount of indebtedness, the uncollected taxes and the levy of the current year are not to be deducted,² but the uncollected taxes and special assessments may be regarded as available for current expenses, and may be deducted from such expenses up to the time of the annual tax sale,³ but after that time the city must prove they have any value before they will be included in determining the power of the city to make a contract for necessary supplies.⁴

It is held that, although there may be money in the hands of the city treasurer which can only be applied towards the payment of certain outstanding bonds, yet the said amount cannot be deducted from the amount of the city's indebtedness,⁵ but if the city has funds in its treasury to meet its indebtedness, or a part of it, the issue of warrants in excess of the limit of indebtedness is not a violation of the limitation, provided the funds, when applied, will reduce the warrants to an amount within the limitation.⁶

¹ Springfield v. Edwards, 84 Ill. 626; Sackett v. New Albany, 88 Ind. 473; *contra*, Lewis v. Widber, 99 Cal. 412.

² Jones v. Hullbut, 15 Neb. 125.

In City of Council Bluffs v. Stewart, 51 Iowa, 385, the court held that the uncollected taxes and the levy for the current year are not to be deducted from outstanding debts for the purpose of ascertaining the real indebtedness.

The court said: "If the bonds in question should be issued upon the faith of the uncollected taxes and the levy for the current year, there

is no power which could prevent the city authorities from absorbing the taxes as collected in payment of ordinary current expenses. Indeed such a course might be absolutely necessary to maintain the city government."

³ Brashear v. City of Madison, (Ind. Sup. Ct.) 36 N. E. R. 252.

⁴ French v. Burlington, 42 Iowa, 614.

⁵ Waxahochie v. Brown, 67 Tex. 517.

⁶ Dillon on Mun. Corp., Vol. 1, § 135 (4th ed.).

The par value of outstanding bonds and not the interest coupons to accrue should be included in the computation.¹

Certificates issued by a city on which to procure temporary loans, stating that the city owes the holder a specified sum of money, and promising or directing the treasurer to pay it at a specified time or otherwise, are evidence of debt owing by the city.²

§ 58. **How taxes may be appropriated after limitation is reached.**—It is held, notwithstanding the fact that the constitutional limitation of indebtedness has been reached, that revenues may be appropriated in anticipation of receipts,³ but the only manner in which revenue already levied, but uncollected, can be anticipated by a city without becoming indebted, is by the drawing of a warrant, after the tax had been levied, which will have the legal effect and operate as a contract between the corporation and the person receiving it that the city shall incur thereby no liability.

If the city incurs any liability thereby, it incurs, either absolutely or contingently, a debt. The effect of the warrant must be to impose the duty upon the proper officers to collect and pay over the taxes in accordance with the appropriation, and the remedy of any failure in that regard must be against the officers and not against the corporation.⁴

The warrant drawn against the taxes levied must virtually operate as an assignment without imposing any liability upon the corporation.⁵

The warrant must be drawn upon a particular fund and uncollected taxes of a particular year, and a warrant addressed to a county or city treasurer, issued after the constitutional limit has been reached, which is in general form and does not purport to be payable from any particular fund or out of the revenues of the taxes of

¹ Finlayson v. Vaughn, 54 Minn. 331; Jones v. Hurlbert, 13 Neb. 125. App. 499; State v. McCauley, 15 Cal. 430.

² Law v. People, 87 Ill. 585. ⁴ Springfield v. Edwards, 48 Ill. 626.

³ State v. Parkinson, 5 Nev. 17; ⁵ Law v. People, 87 Ill. 385. East St. Louis v. Flannigan, 26 Ill.

any specified year, is simply an evidence of indebtedness, and therefore void.¹

It has been held that the addition of an interest clause to such a warrant would not have the effect of bringing it within the constitutional limitation.²

§ 59. **What is excluded in the calculation.**—When a local improvement, such as the building of sewers and the like, is undertaken, and the contractor agrees to accept as payment certificates which assess the property improved and to look only to such certificates for his pay, the amount of such contracts are not to be estimated in calculating the municipal debt, nor is such contract void even though executed after the limitation has been reached.³

Where the bonds are to be paid out of a special fund to be raised by assessments for benefits for local improvements, and are not to be a general debt of the municipality, such bonds are not to be included in the calculation. In order, however, to be excluded, the bonds must state upon their face that they are to be paid only out of a specified fund.⁴

The ordinary expenses of the city for the current year should not be included in the computation, because such expenses are not to be considered as debts,⁵ but are to be paid by the levy and collection of the annual taxes of the same year. If, however, the current expenses exceed the amount of the levy, the excess should be regarded as a debt.⁶

¹ *People v. May*, 9 Colo. 404; *Fuller v. Chicago*, 89 Ill. 282.

² *State v. Parkinson*, 5 Nev. 17.

³ *Davies v. Des Moines*, 75 Iowa, 500; *Tuttle v. Polk*, (Iowa) 69 N. W. R. 733; *Little v. City of Portland*, (Or.) 37 Pac. Rep. 911.

⁴ *Quill v. City of Indianapolis*, 121 Ind. 292.

⁵ *Grant v. Davenport*, 36 Iowa, 396; *Ivanson v. Hance*, 4 Wy. Ter. 275; *City of Coayers v. Kirk*, 78 Ga. 480; *Smith v. Dedham*, 144 Mass. 177.

⁶ In the case of *Appeal of Erie*, 91 Pa. St. 398, Gordon, J., quoted the following from *Grant v. Davenport*, 36 Iowa, 396:

“When the contract made by the municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues, and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the incurring of indebtedness within the

Where a city purchases for its sinking fund a portion of the city loans and they are no longer, as affects the city, a liability, the certificates so purchased, though not cancelled, are no part of the city debt,¹ but it is held that an investment of a city of its sinking funds in its own bonds does not work a cancellation of the bonds.²

The issue of bonds to pay off or refund an already existing debt does not increase the city debt, but merely changes its form ;³ but if the proceeds of the new bonds are diverted, and not in fact applied towards the payment of the old bonds or old debt, and the new issue exceeds the limitation. it is held that the purchaser of the new issue is bound to see that the proceeds are properly applied. A case in point is that of *Township of Doon v. Cummings*, 142 U. S. 366.

In this case it appeared \$25,000 of bonds were issued by the county for the purpose of paying off a part of its outstanding bonded indebtedness, and but \$6,000 of the amount realized from the sale was in fact applied to pay off the outstanding indebtedness, the balances being used to pay off other claims, and the issue, together with the old bonds, exceeded the constitutional limitation.

The court held the present issue to be invalid and prohibited, because the money obtained from the sale was not applied in full to the payment of the old bonded indebtedness.

A dissenting opinion by Justices Brown, Harlan and Brewer held that it was not necessary that the purchaser

meaning of the constitutional provision limiting the power of municipal corporations to contract debt." And then said : " This, we hesitate not to say, is a sound constitutional interpretation, and in a similar case might well be adopted in the construction of our own constitution. If the contracts and engagements of municipal corporations do not overreach their current revenues, no objections can lawfully be made to them, however great the indebtedness of such municipalities may be : for in such case their engagements do not extend beyond their present means of payment, and so no debt is created."

¹ *Brooks v. City of Philadelphia*, 162 Pa. 123.

² *Elsen v. City of Ft. North*, 27 S. E. R. 739.

³ *Powell v. Madison*, 107 Ind. 106 ; *City of Poughkeepsie v. Quintard*, 19 N. Y. S. 911 ; *Farson L. & Co. v. Louisville*, (Ky.) 30 S. W. R. 17 ; *Miller v. School Dist. & C.* (Wyo.) 39 Pac. R. 879.

see that the money realized from the new issue be applied to the payment of the old, but that he had the right to presume that the officers would not betray their trust and would do their duty and apply the money as required by law.

Where the bonds are payable out of a fund which consists entirely of receipts from local improvements, assessed against the property benefited, they are held to create no debt against the city within the meaning of the constitution.¹

§ 60. **Contracts for more than one year.**—Whether, when a municipal corporation enters into a contract which extends over a period of years, as for water, gas, electric lights and the like, and a certain sum per annum during the entire period is to be paid, such entire contract or only the annual payments are to be included when calculating the municipal debt, is a very vexed question, and the decisions of the State courts are not harmonious upon it. The weight of the decisions,² and which we regard to be the proper view of the question, is that such a contract is not prohibited even if the total amount which the corporation will have to pay, will, with the other debts of the municipality, exceed the statutory or constitutional limitation. Only the annual payment of the year when the calculation is made should be considered as a debt.

The future liability is not considered as an entire debt, but only a continuing provision for future current expenses to be taken care of and provided for each year by taxation.

The case of *Walla Walla Water Co. v. City of Walla Walla*, 60 Fed. Rep. 957, illustrates the point.

The city of Walla Walla entered into a contract to pay

¹ *Quill v. City of Indianapolis*, 23 415; *Dively v. Cedar Falls*, 26 Iowa, N. E. R. 788; *Tuttle v. Polk*, (Iowa) 233; *Weston v. Syracuse*, 17 N. Y. 60 N. W. R. 733. 110; *Smith v. Dedham*, 144 Mass.

² *Carlyle W. L. P. Co. v. City of Carlyle*, 31 Ill. App. 325; *Walla Walla Water Co. v. City of Walla Walla*, 60 Fed. Rep. 957; *East St. Louis v. East St. Louis & Co.*, 98 Ill. 177; *Territory v. City of Oklahoma*, 37 Pac. Rep. 1094; *Saleno v. City of Neosho*, (Mo.) 30 S. W. R. 190; 15 Am. & Eng. Ency. of Law, 1130.

\$1,500 per annum for twenty-five years, for a water supply for the city.

The aggregate amount to be paid under the contract, with the then present debts of the city, far exceeded the limit of indebtedness fixed by its charter.

Handford, J., in the United States Circuit Court, held the contract to be good, and said:

“By the terms of the contract the city became obligated to pay in quarterly instalments, as the same should be earned by compliance with the contract on the part of water company.

“If any part of the money is not earned the city will not have to pay it. If the money shall be earned the city will avoid an accumulation of debt by paying according to the contract.

“Notwithstanding the very respectable authorities cited by the counsel for the city I hold that while the contract created a binding obligation it does not create a debt.

“The item of expense under this contract stands precisely the same as other items of regular current expenses incidental to running the government and provided for by contracts or ordinance of the city.”

§ 61. **Contra view.**—The courts adopting the contrary view, regard the entire sum as a debt or obligation of the municipality, and that when it enters into such a contract it incurs an indebtedness within the meaning of the constitution for the total amount of the contract.¹

The case of *Read v. Atlantic City*, 49 N. J. L. 558, is one illustrating this latter doctrine.

The charter of Atlantic City in New Jersey contained a limitation that its “debt shall at no time exceed \$35,000.” The city was indebted in this sum when it entered into a contract with a water company to supply itself with water for public purposes for an indefinite period, making no provision, however, to raise by taxation the amount that the city should be called on to pay under the

¹ *Beard v. City of Hopkinsville*, 24 S. W. R. 872; *Buchanan v. Litchfield*, 102 U. S. 278; *State v. Atlantic City*, 49 N. J. L. 558; *City of Springfield v. Edwards*, 84 Ill. 626; 15 Am. & Eng. Ency. of Law, 1128, n. 7.

contract. It was held that the contract and ordinances were *ultra vires*, and the same were set aside. After reviewing the case in Iowa, Illinois, Indiana and Pennsylvania, Magie, J., said:

"It is impossible perhaps to entirely reconcile these cases. The true interpretation of such restriction on municipal indebtedness, in my judgment, lies between the extremes they exhibit. The plain object of such restrictions is to require that all moneys which are to be paid for municipal expenses after the debt has reached the fixed limit shall be raised by taxation. In view of this object it is clear (and all the cases agree in this) that prohibitions against increasing the indebtedness or the debt of a municipality are not to be construed as limited to obligations which are debts *eo nomine*, but are to be extended to all contracts whereon the payment of money may be enforced. But where the money to be paid upon such contracts is provided for to be raised by taxation, upon some fixed and definite scheme, such contracts are not, in my judgment, within the prohibitions. Where, however, the money required to meet such contracts is not provided for either by being legally ordered to be raised by taxation and appropriated for that purpose, or by some legislative scheme which positively prescribed that it shall be raised by taxation and appropriated for its payment as needed, then such contracts do increase the indebtedness or debt of municipal corporations within the meaning of such prohibitions.

"Any other construction would deprive these restrictions of the force requisite to reach and cure the evil intended to be prevented thereby."

§ 62. **Liabilities arising ex delicto** are not within such statutory or constitutional limitation, and judgments obtained in actions of that nature are not to be included in the debts of a municipality, the prohibition applying only to contracts or debts voluntarily incurred.¹

§ 63. **Effect, if limitation exceeded.**—Bonds and other municipal evidence of debt issued in excess of the statu-

¹ *Bartle v. Des Moines*, 38 Iowa, 114; Dill. on Mun. Corp. Vol. 1 (4th ed.), 137.

tory or constitutional limit are void¹ in the hands of innocent holders, except where the bonds contain recitals which estop the corporation from setting up the over-issue as a defence, as elsewhere shown.²

If the bonds or warrants or other evidence of debt are but a part in excess of the limitation and can be separated, those within the limitation, that is, those issued before the limitation was reached, will be valid, and the balance only void.³ A court of equity will not aid in scaling down the issue so as to discover the valid from the void, nor will money loaned for an improvement, or work done in excess of such limitation, become a lien upon the works,⁴ and a statute attempting to make such a lien is unconstitutional and therefore invalid.⁵

Any taxpayer may enjoin the issue of bonds in excess of the limitation, or the making of a contract in excess, or the levying of a tax to pay the bonds, or interest thereon, or any other debt which violates such limitation.⁶ In one case, where the corporation neglected to defend itself in an action brought to compel the levying of a tax to pay a debt which exceeded the limit, it was held a taxpayer of the corporation was entitled to intervene in the suit and set up the defence that the limit of indebtedness was exceeded.⁷

The invalidity of a debt, void because in excess of the statutory or constitutional limit of debt, must be pleaded as a defence in the action to recover a judgment thereon,

¹ In *McPherson v. Foster*, 43 Iowa, the court held that bonds issued in excess of the constitutional limit of indebtedness were void in the hands of all persons. So bonds issued in excess of the constitutional limit of indebtedness of the Pennsylvania constitution were held invalid in the hands of *bona fide* holders. *Millerstown v. Fredericks*, 114 Pa. St. 435.

² *Millerstown v. Fredericks*, 114 Pa. 435. See §§ 221 *et seq.*

³ *Catron v. Lafayette Co.*, 106

Mo. 659; *Merchants' etc. Bank v. Bergen*, 115 U. S. 384.

⁴ *Litchfield v. Ballou*, 114 U. S. 190.

⁵ *Mosher v. School Dist.*, 44 Iowa, 122.

⁶ *Springfield v. Edwards*, 84 Ill. 625; *Davenport v. Klienschmidt*, 6 Mont. 502; *Dill on Mun. Corp.*, Vol. 11 (4th ed.), §§ 914, 916, 918, 919 n.; *Smith v. Broderick*, (Cal.) 40 P. R. 1033.

⁷ *Richards v. Supervisors*, 69

Iowa, 612.

and cannot be set up against the judgment or against bonds issued to fund such judgment.¹

Where a liability has been incurred by a municipal corporation, when its total indebtedness, including such liability, is within the constitutional limit, the fact that a subsequent valuation of the city's property for taxation reduces the former valuation so as to increase the city's debt beyond the limit will not invalidate warrants thereafter issued to evidence such liability.²

After the limitation of debt, whether statutory or constitutional, has been reached, no further debt can be lawfully contracted, but as soon as the debt is reduced below the limitation, new debt up to the limit may be legally incurred.³

While the weight of the decisions are opposed to permitting a municipal corporation to incur indebtedness in any form, or for any purpose beyond the constitutional limitation, there are a number of cases which hold that a municipality has the right to incur indebtedness for its

¹ *Etna Life Ins. Co. v. Lyon Co.*, 44 Fed. Rep. 329. In this case Shiras, J., for the court said:

"The constitutional limitation is not self-acting. The protection of its provisions must be invoked at the time and in the proper mode. If judgments are obtained against a county, and the same are not reversed, but remain in full force, they are evidence of the highest nature that the county owes the amounts adjudged to be due; and if the county, having the power to fund its outstanding indebtedness, issues bonds in payment of such judgments, the validity of the bonds cannot be successfully attacked, when suit is brought thereon, by showing that, if the defence had been interposed in the original case, the claim might have been defeated, and that the judgment actually rendered might have been

prevented. . . . It requires a proper pleading of the facts, and upon the trial proper evidence must be introduced or else the defence fails. It makes no difference in the validity of the judgment whether the defendant failed to plead the defence based upon the constitutional limitation, or failed to sustain the defence, if pleaded by sufficient evidence. In either case the rendition of the judgment established the validity of the claim against the county, and the judgment, so long as it remains unreversed, cannot be questioned on the ground that the amount thereof exceeds five per cent of the taxable property of the county."

² *Childs v. City of Anacortes*, 5 Wash. St. 452.

³ *Brooks v. Philadelphia*, 29 Atl. R. 387; 162 Pa. St. 123.

ordinary running expenses after the limitation has been reached.¹

§ 64. **How the limitation is to be construed.**—The limitations which restrict municipal corporations in their power to contract debts are to be construed according to the terms of the constitution or the statute having reference to existing facts, and any construction which would defeat their object should not be favored,² but when the prohibition is against the incurring of indebtedness for general purposes, it has been held that the laying of a sidewalk being for a special purpose was not prohibited.³

A provision in a city charter that the council shall not have power to pledge the credit of the city for more than a specified sum without submitting the question to the voters of the city is regarded as a definite restriction on the power, and a subsequent statute authorizing a city to issue bonds for a larger amount is subordinate to and does not override the restriction in the charter.⁴ Where, however, the intention of a subsequent act, as gathered from all its parts, is to permit the incurring of a debt beyond the limit fixed in the charter, the amount of the debt is not restricted by the charter limitation, but that contained in the subsequent act.⁵ Where the limit of tax or debt is fixed by the constitution, and no statute prohibits a lesser, the limit in the constitution is to be applied. The constitution executes itself.⁶ Where a statute authorized a town to issue bonds, "in any amount," in aid of a railroad, such amount cannot exceed the constitutional limit of debt.⁷

Under the constitution of the State of New York, amended 1885, art. 8, sec. 11, providing that "no coun-

¹ Grant v. Davenport, 36 Iowa, 391; State v. Guttenberg, 39 N. J. 396; Porter v. Douglass, 87 Mo. L. 660; State v. Folley, 16 S. E. R. 239; Corpus Christi v. Wessner, 195.
58 Tex. 462.

² French v. Burlington, 42 Iowa, 614.

³ Hitchcock v. Galveston, 96 U. S. 314.

⁴ Cumberland v. Magruder, 34 Md.

⁵ Stoud v. Consumers' Water Co., (N. J.) 28 Atl. Rep. 578.

⁶ Wall v. Austin, 22 S. W. R. 673.

⁷ Atl. Trust Co. of N. J. v. Darlington, 63 F. R. 76.

ty . . . or any such city shall be allowed to become indebted . . . to an amount which . . . shall exceed ten per centum of the assessed valuation of the real estate of such county or city subject to taxation," it has been held that city and county may each incur debt to the extent of ten per centum of such value, though the lands in the city are charged with the debts of both city and county.¹ In the case of *City of Rochester v. Quintard*, 136 N.Y. 221, it was held that art. 8, sec. 11, which limits the indebtedness which may be incurred by a city having a population of 100,000 or over, or a county containing such a city, to ten per centum of the assessed valuation of real estate, except for water supply or for revenue bonds, and in such cases that the bonds should be payable within twenty years and a sinking fund sufficient to extinguish the debt should be provided, did not apply to a city when its debt limit had not been reached, including among the debts the amount of the bonds issued, and that, therefore, an act authorizing the issue of bonds for a water supply, payable in fifty years, was not unconstitutional, since all the debts of the city, including the proposed bond issue, were within the ten per centum.

In *Sweet v. Syracuse*, 129 N.Y. 316, it was held that art. 8, sec. 11, does not apply to cities having a population of less than 100,000, or a county not containing a city of 100,000 or over, except that it forbids the creation by any city of a debt for any purpose other than a city or public purpose, and such cities may contract for any desired amount for such purposes.

¹ *Adams v. East River Sav. Inst.*, 20 N. Y. S. 12; 61 Hun. 635. This case was affirmed in 136 N. Y., p. 52, and Cullen, J., as to the construction of such a prohibition, said:

"If the language is unambiguous, the words plain and clear conveying a distinct idea, there is no other interpretation.

"Effect must be given to the intent as indicated by the language employed. Especially should this be so in the interpretation of a written constitution framed delib-

erately and with care, and adopted by the people as the organic law.

. . . We must therefore decide the case in the very words of the constitution (see quotation above). The literal and grammatical reading is that the county shall not be allowed to incur debt beyond a certain per cent, and that the city shall not be allowed to incur debt beyond the same per cent. Separate restrictions are imposed upon both.

"This is so clear to my mind as to forbid elaboration."

Under the amended constitution of New York, which took effect January 1st, 1895, declaring that "all indebtedness" incurred by any city in excess of the limitation imposed by it, except such as existed when it took effect, should be absolutely void, it is held that such provision does not apply to existing contracts by which a greater indebtedness will be incurred, and that the word "indebtedness" is used in the sense of obligation, and therefore includes existing contracts which are not affected by the constitution, but expressly excluded.¹

In Texas, where the constitution provides that, when a debt is incurred the municipality shall at the same time make provision for levying and collecting a tax sufficient to pay the interest, and also a sinking fund of at least two per cent per annum, the constitution also provides that the tax to be levied for public improvements shall not exceed twenty-five cents on \$100 for any one year. The United States Circuit Court² held that the limitations prohibited the incurring of a debt above a sum upon which the interest, together with the two per cent for the sinking fund, would exceed the revenue derived from a tax of twenty-five cents on the dollar, and consequently held bonds issued in excess of that sum invalid.

¹ Sheehan v. Treasurer of L. I. City, 32 N. Y. S. 428.

² Millsaps v. City of Terrell, 60 F. R. 193.

CHAPTER VI.

CONSENT OF TAXPAYERS TO ISSUE OF BONDS—PETITION.— ELECTION.

SECTION.

- 65—Petition of taxpayers or voters—When necessary—How consent given—Effect of.
- 66—Question of issuing bonds often submitted to the voters—What States by constitution require it.
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SECTION.

- 74—Proposition, how submitted.
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- 76—When proposition may be submitted.
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- 82—How result of election should be declared.
- 83—Proposition as carried cannot be changed—If done bonds sometimes held valid—When it may be changed.
- 84—Affirmative vote not a contract.

§ 65. **Petition of taxpayers or voters.**—It is frequently made necessary by the statute authorizing the issuing of bonds or other written evidence of municipal indebtedness, that before the officers of the corporation or the judge of the court can issue the bonds or incur the debt, or before an election can be held submitting a proposition to incur a debt, that the consent of a certain number of the taxpayers of the locality petition, or their consent be obtained, or that the bonds or other evidence of debt be issued upon a petition of a certain

number of the taxpayers ; and until such petition is presented the officers authorized to act cannot do so.¹

When a taxpayer has given his consent he may revoke it by a writing before it has been acted upon.² And where he has signed a petition he may revoke it if he does so before the judge or other officer to whom it is intended to be presented acquires the right to act upon it,³ but the withdrawal must be made before, and not after, the hearing on the petition.⁴

Several petitions may, for convenience, be circulated and signed at once, and presented at different times.⁵ Where the consent of taxpayers of a certain class is required the petition must show that its signers belong to that class.⁶

Where the affidavit of the assessors was made the evidence of the assent of the necessary proportion of the people, it was held that until such affidavit was made the assent of any signer might be withdrawn.⁷ And where the assent was to be evidenced by a certificate to be filed and recorded in the office of the town clerk, and it appeared that the certificate was filed, but not recorded, a *mandamus* to compel the issue of the bonds was refused.⁸

It has been held that the power vested in a taxpayer to sign his consent cannot be exercised by proxy,⁹ but this does not prevent the signature by another of the name of one who is present and assents, and written authorization to sign attached to the petition is sufficient.

When the statute authorizes the court to issue the bonds when a majority of the taxpayers whose names ap-

¹ *Craig v. Andes*, 93 N. Y. 405.

⁵ *People v. Hewitt*, 5 Laus. (N. Y.)

² *Springport v. Teutonia Sav. Bk.*, 89.

84 N. Y. 403. After reference to a committee and before final action he may withdraw his name. *Noble v. City of Vincennes*, 42 Ind. 125.

⁶ *Rich v. Mentz Township*, 134 U. S. 662 ; *Mentz v. Cook*, 108 N. Y. 504.

³ *People v. Kenshaw*, 61 Barb.

⁷ *People v. Allen*, 52 N. Y. 538.

409 ; *Biddell v. Borough of Rivington*, (N. J.) 33 Atl. R. 279.

⁸ *Essex Co. R. R. Co. v. Lunenburg*, 49 Vt. 143.

⁴ *Town of Springfield v. Sav.*

⁹ *Peoples v. Knowles*, 47 N. Y.

Bank, 84 N. Y. 403.

pear upon the last preceding tax-list or assessment-roll as owning a majority of the taxable property in the corporate limits make application by petition, the petition, it has been held, must actually be signed by a majority of such taxpayers, and that verbal authority to sign their names was not sufficient, and further, that the facts must be proved by affidavit, and that the court could not act upon his personal knowledge.¹

And where the act required that the petition for an election be signed by a majority of the freeholders, and at a meeting held therefor the names of those who were favorable thereto were publicly announced, and a committee appointed to sign such names. No objection was made, and it was held that this was a sufficient signing and compliance with the requirements of the statute.²

The petition must be drawn with care, having reference to the enabling statute, and must comply with it and also the decisions of the courts on the subject.³ It must not be conditional,⁴ and must allege that the necessary consent has been obtained in the manner required by the statute.⁵

Where a city was authorized to take stock in a railroad company "on the petition of two-thirds of the citizens, who are freeholders," etc., the bonds were issued, and the minutes of the council simply stated that "the freeholders of the city, with great unanimity, had petitioned." It was held that the council were the proper judges whether or not the required number had petitioned, and that the city was concluded by the ordinance issuing the bonds from setting up any irregularities.⁶

Where the statute required that the petition must be signed by "a majority of the taxpayers, exclusive of those

¹ *People v. Smith*, 45 N. Y. 772.

² *In Chicago etc. R. R. Co. v. Coyer*, 79 Ill. 373.

³ *I. N. & S. R. R. Co. v. City of Attica*, 56 Ind. 476.

⁴ *Craig v. Town of Andes*, 93 N. Y. 405; *contra Bittenger v. Bell*, 645 Ind. 445.

⁵ *Morrison v. Bernards*, 29 N. J.

L. 219. In proceedings by injunction by taxpayers, signatures attached on Sunday were held to be void. *De Forth v. Wisconsin etc. R. Co.*, 320.

⁶ *Van Hest v. Madison City*, 1 Wall. 291. For sufficiency of petition, see 22 Am. & Eng. Corp. Cases. 54 n.

taxed for dogs and highway purposes only," a petition which recited that it contained the assent of "a majority of the taxpayers" was held insufficient, and the bonds issued pursuant to the petition were held invalid, the court holding that the judge who issued the bonds never acquired jurisdiction.¹

Where the statute required the "consent of a majority of the taxpayers appearing upon the last assessment roll as shall represent a majority of the landed property of the township," the consent of a majority of all the taxpayers and a majority which will also represent a majority of the real estate is necessary.²

The "last assessment roll" refers to the roll next preceding the time of acceptance by the people.³

Under the Wisconsin statute,⁴ which permits persons who were residents of the district on the day when the petition may first be presented, and whose property was assessed on the last assessment roll, except idiots, insane persons and minors, to sign the petition, it has been held that in determining whether the petition was signed by a majority of the resident taxpayers, idiots, insane persons and minors must be counted.⁵

In some of the States the school-district boards have no authority to call an election to submit the proposition to issue bonds, unless a certain number of the taxpayers or other designated persons petition that such an election be called, and it has been held that where such a petition is presented, the determination of the board is not conclusive of the qualifications of the petitioners, but that the same may be reviewed in an application to restrain the issue of bonds.⁶

§ 66. **Question of issuing bonds often submitted to the voters.**—The constitutions of many of the States require that the question whether a municipality shall incur

¹ Rich v. Mentz Township, 131 U. S. 623; Town of Mentz v. Cook, 108 N. Y. 504.

⁴ Rev. Stat. 946.

⁵ State v. Blackstone, 63 Wis. 362.

⁶ Fullerton v. School Dist. of Lincoln, Neb., 59 N. W. R. 896; 41 Neb.

² Lane v. Schomp, 20 N. J. Eq. 82.

³ Duanesburgh v. Jenkins, 46 Barb. 294.

debt and issue bonds therefor shall first be submitted to the taxpayers of the locality for approval, and that only after an affirmative vote can the municipality incur the debt and issue the bonds.

This prior submission of the question to the voters of the municipality is a very common practice in many of the States, and this mode of assent is held to be, in no sense, a delegation of legislative authority, but a question of acceptance or rejection of power.¹

The constitutions of the following named States contain provisions which prohibit municipalities from incurring any debt, or increasing the debt above a certain per centum of the assessed valuation, without the consent of the voters :

California, Colorado, Georgia, Idaho, Kentucky, Missouri, Montana, Nebraska, North Carolina, North Dakota, Pennsylvania, Washington and Wyoming.

The reader is referred to the abstracts from the State constitutions appended to this volume, for fuller information as to the constitutional requirements on this subject.

Many of the statutes under which bonds are issued also contain the same provisions, although the constitution of the particular State does not require the submission of the question.

§ 67. **When submission required bonds cannot issue without it.**—It may be said generally that when an election is required for this purpose, the officers of the municipality cannot act without it, and their acts in such cases would be void for want of jurisdiction,² and if they act, or attempt to act, without an election being first held, the issue of the bonds or other evidence of debt will be restrained, and a taxpayer need not wait until the bonds or other paper are called for or issued.³

¹ Paterson v. Society, 4 Zab. (N. J.) 385; Bank v. Brown, 26 N. Y. 457; Foote v. Cincinnati, 11 Ohio, 408; Stone v. Charleston, 114 Mass. 214; Black's Const. Law, 281.

186; Board of Com'rs v. McChintock, 51 Ind. 325; Steines v. Franklin Co., 48 Mo. 167.

² Cowdry v. Cancedea, 16 F. R. 532; Louis v. Bourbon Co., 12 Kan.

³ Winston v. Tenn. & P. R. R. Co., 57 Tenn. 60; Harding v. Rockford, 65 Ill. 90.

And where an election is required to give the municipality power to incur debt and to issue bonds, the proposition must, under the statute, be submitted to the people and accepted by them before the bonds can issue. If no election is in fact held, or the proposition not submitted, the bonds or other paper if issued are void,¹ although it has been intimated that if the paper contain proper recitals made by authorized officers of the corporation, the corporation will be estopped from setting up the defect as a defence.²

When the constitution requires that the question be submitted, if not done, and if the bonds are issued, they are void, and there can be no estoppel.³

The constitution of Idaho, art. 8, sec. 3, provides that "no county shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in that year the income and revenue provided for it for said year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose. It was held that the county without such a vote could not issue bonds, the amount of which exceeded such income, though the purpose of the issue of the bonds was to pay existing indebtedness.⁴

When a general statute authorizes a municipal body or a court to issue bonds for a particular purpose upon the assent of the legal voters, and afterwards a subsequent special statute authorizes the issue of such bonds for the same purpose without a vote, bonds may be legally issued pursuant to such subsequent statute without a vote, provided the constitution of the State does not require such prior submission, and the special act itself is not in conflict with the constitution.⁵

A municipality may, if it choose, submit a question to the voters, although not required to do so,⁶ but if no

¹ Chambers v. Clews, 21 Wall. 317; Steines v. Franklin Co., 48 C. C. R. 236.

Mo. 167; Flagg v. Palmyra, 33 Mo. 40, explained. ⁴ Bannock Co. v. Bunting & Co., 37 P. R. 277.

² Dill. on Mun. Corp. (4th ed.) § 525; Mayor v. Lord, 9 Wall. 411. ⁵ County of Tipton v. Locomotive Works, 103 U. S. 523.

§§ 200, 201. See also §§ 240-252. ⁶ Mason v. Shawneetown, 77 Ill. 533.

power existed a submission will not authorize an issue of bonds.¹

When the vote is held before the statute authorizing it was adopted, it would confer no authority,² unless the statute in terms provided that such vote should be considered an approval.³ Where certain townships had voted under an unconstitutional statute to aid a railroad, and had issued their bonds in pursuance thereof, the Supreme Court of South Carolina⁴ held an act subsequently passed to impose upon the consenting townships the debt which they had so consented to, to be constitutional. The court said :

“ Except for governmental purposes proper, we do not think that the Legislature has the power to impose a tax upon the people of any particular locality or territorial subdivision of the State without their consent. In this case, however, such consent was given, and that is the avowed basis upon which the act of 1888 rests. It is argued, however, that such consent has only been manifested by an election held without authority of law, and hence should not be regarded. It seems to us that it is not at all material how the assent of the people has been given. All that was necessary was that the Legislature should be satisfied that consent had been given, and the terms of the act, especially the preamble, show plainly that they were notified of that fact.”

The same court held in another case⁵ that there was no necessity under the same act to issue new bonds, but that the debt imposed upon the townships by the subsequent act of 1888 was represented by the old bonds to be paid in the manner provided in the subsequent act.

Where an election is a condition precedent, the proposition submitted to and approved by the vote of the people is the only one upon which the officers of the municipality can act.

¹ Hayes v. Holly Springs, 114 U. S. 120.

² Berlin v. Waterloo, 14 Wis. 378.

³ Leavenworth v. Barnes, 94 U. S. 70; Johnson v. Thayer, 94 Ib. 631.

⁴ State *ex rel.* Dickinson v. Neely, 30 S. C. 587; 9 S. E. R. 664.

⁵ State *ex rel.* C. C. & C. Co. v. Whitesides, 30 S. C. 579.

§ 68. **What irregularities do not affect vote.**—All the preliminaries to the elections must conform fully to the course marked out in the statute, and a failure so to do will present sufficient reasons to restrain the issue of bonds or other municipal paper on the application of a taxpayer,¹ but irregularities which do not affect the result of the vote and do not go to the jurisdiction, do not affect the validity of the bonds in the hands of a *bona fide* holder.²

In the case of *Pana v. Bowler*, 107 U. S. 529, it appeared that the bonds in suit were issued by the township of Pana to aid a railroad, and recited that they were issued in compliance with the consent of the legal voters thereof at an election held on a certain day named. It appeared that the election was not held by the proper officers, but the bonds were in the hands of a *bona fide* holder. The court held the township to be estopped from setting up the defence that the proper officers did not preside at the election and held the bonds in the hands of a *bona fide* holder good.³

The court in this case refused to follow the decision of the Supreme Court in *Lippincott v. Town of Pana*, 92 Ill. 24,⁴ where like bonds were held invalid in the hands of a *bona fide* holder. The court said :

¹ *People v. Town of Santa Anna*, 67 Ill. 57.

² *Johnson Co. v. Thayer*, 94 U. S. 631; *Com'rs v. Sharter*, 50 Ga. 489; *Am. & Eng. Ency. of Law*, Vol. 15, p. 1275; *Nat. Bk. v. Granada*, 41 Fed. Rep. 87; *Irwin v. Lowe*, 89 Ind. 540; *Madison v. Pristly*, 42 Fed. Rep. 87; *Pana v. Bowler*, 107 U. S. 529.

³ In the late case of *Coler v. Rhoda School Tp. of Charles Mix Co.*, (S. D.) 63 N. W. 158, where the statute pursuant to which the bonds in suit were issued authorized the school board upon a petition in writing by a majority of the resident electors to give notice of an election to submit the proposition

to issue bonds, it appeared that the election was held and the proposition submitted and carried, and the bonds in suit were issued, but no petition was presented, and the notice of election as required by the statute was not given.

The bonds recited the enabling act, and were sold for full value and the money applied to the purpose of the issue. The first installment of interest was paid. The court held the bonds to be valid in the hands of a *bona fide* holder, holding that the recitals imported a strict compliance with the statutory requirements.

⁴ In *Lippincott v. Town of Pana*, 92 Ill. 24, it was held that where

"We are not bound to accept the inference drawn by the Supreme Court of Illinois that, in consequence of such irregularity in the election, the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of *bona fide* holders.

"This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however able or learned it may be."¹

This case also held that the irregularity in the conduct of the election did not throw upon the holder of the bonds the burden of proving himself to be a *bona fide* holder, for value without notice, nor alter the general rule that when the holder of a negotiable instrument, regular on its face and payable to bearer, produces it in a suit to recover its contents, he is to be *prima facie* pre-

the statute required the election to be held in same manner as a general election, that if it was in fact held as a special town meeting, and not as a general election, it will be a nullity and confer no power to issue bonds, and if they are issued they will be void. In this case the bonds recited that they were issued by the township in compliance with the legal voters thereof and recited the enabling acts. The court held that there was an entire absence of power and not a defective execution of power. And further held that the purchaser, notwithstanding the recitals, was bound to look at the records, and if he had done so he would have ascertained that the wrong officers conducted the election.

In *J. N. W. & S. E. R. R. Co. v. Virden*, 104 Ill. 339, it was held that

an election called by the wrong person or body is absolutely void and so are bonds issued pursuant to such an election.

In *Veder v. Lind*, 19 Wis. 280, it was held that although a bond recited that it was issued pursuant to the enabling statute, which it recited, and in pursuance of a vote of the legal voters authorizing the issue, the bond was invalid because the statutory notices of election were not given.

The court held the holder was bound to look at the record. The supervisors were only to act after an affirmative vote.

The court in this case acknowledged that its decision was not in line with the Federal cases.

¹ See also *Fidelity T. & S. U. Co. v. City of Morganfield*, 29 S. W. R. 442.

sumed to be the holder of it, for value at its date, and became so possessed of it in the usual course of business.

Irregularities will not invalidate negotiable bonds in the hands of innocent holders, although they are such that, had the question been raised in the proper manner, and before they reached the hands of the innocent holders, the bonds would have been held invalid.¹

All the proceedings leading up to the vote must be performed as required by the enabling act, otherwise the issue will be restrained. If the proper notice of election is not given as to time or place the issue will be restrained,² or if the proposition contained in the notice of election is not the one submitted the issue will be restrained.³

The good faith of the electors will not be questioned in collateral proceedings,⁴ nor will promises held out to induce voters to give their consent, and where certain citizens agreed to subscribe an amount equal to the tax, if the proposition to issue the bonds was carried, this agreement was held not to be a bribe.⁵ Fraud practised in the election must be shown before the bonds pass into the hands of a *bona fide* holder in order to be available as a defence.⁶

§ 69. Submission necessary, although debt limitation extended.—Where the charter provided that the amount of the bonded debt should not exceed a certain sum, and that the electors should first approve before the debt was incurred, and subsequently an act was passed which authorized the city to issue bonds to an amount exceeding the sum designated in the charter and repealed “all acts and parts of acts inconsistent with the provisions” thereof, it was held that the subsequent act did not repeal the charter provision requiring a vote of

¹ State v. Hardy, (Kan.) 18 Pac. R. 942.

² Harding v. Rockford R. R. Co., 65 Ill. 90; Nat. Bk. v. Granada, 44 F. R. 262; McVichie v. Knight, 51 N. W. R. 1094.

³ Packard v. Jefferson Co., 2 Cal. 338.

⁴ State v. School Dist. No. 4, 13 Neb. 139.

⁵ Hord v. Rogersville etc. R. Co., 3 Head (Tenn.) 208.

⁶ Johnson v. Stark Co., 24 Ill. 75.

the people, but only extended the limit of the debt to be so authorized.¹

§ 70. **Effect of constitutional amendments requiring submission.**—When a municipality has authority under existing laws to issue bonds, without a vote of the people, and the people afterwards adopt a constitution which prohibits the Legislature from passing laws authorizing the issue of bonds without such a vote, the municipality may issue bonds under the original authority, if it remains unchanged by the Legislature, without regard to the change in the constitution, because the constitutional provision is prospective and curtails only the future acts of the Legislature.²

When, however, the constitutional amendment is directed to the municipalities, and prohibits them from incurring a debt, unless the legal voters consent, the limitation acts at once and repeals all prior authority to incur debts without an election.

§ 71. **When election set aside, and its effect.**—It is a rule of the courts to sustain rather than defeat the vote of the people, and an election will not be set aside for a mere irregularity or informality which does not in any manner affect the result of the election.³

But when the Legislature declares a certain irregularity in election procedure as fatal to the validity of the returns, the courts effectuate the commands; otherwise they will ignore such irregularities as are free from fraud and have not interfered with a fair expression of the voter's will.⁴

And a court, on the application of a taxpayer to restrain the issue of the bonds, will not entertain, as a reason therefor, the inducements held out to the voters.

It can be stated as a general proposition, that when the electors have not had a fair opportunity to express their will at an election, by reason of fraud or gross irregulari-

¹ State v. Folley, 16 S. E. R. 195.

² Scotland Co. v. Thomas, 94 U. S. 682; Ralls Co. v. Douglass, 105 U. S. 728.

³ Ackerman v. Hæneck, 147 Ill. 514; Lehlback v. Haynes, (N. J.)

23 Atl. R. 422; United States v. Memphis, 97 U. S. 284; Cooley on Const. Lim. 618.

⁴ Bowers v. Smith, (Mo. Sup.) 20 S. W. R. 101.

ties on the part of the election officers, or on the part of the municipal officers, to such an extent that but for such fraud or irregularities the result of election would have been different from the declared result, that the election will be set aside,¹ but proceedings to set aside an election will not affect bonds issued as a result of such an election, if in the hands of innocent purchasers. Nor will the fact that such election was fraudulently conducted, or irregularities were permitted or practised to such an extent as to have changed the result of the election, affect bonds in the hands of a *bona fide* holder, issued pursuant to such an election,² if the bonds contain recitals which will estop the corporation from setting up the fraud or irregularities,³ or it be estopped by its records.⁴

And although the bonds contained no recitals they will be valid, if the proceedings of the municipality, or of the officers authorized to issue the bonds, showed that they had passed upon and accepted such election as a valid one.⁵ And the corporation may also be estopped by laches or acquiescence on the part of the corporation issuing the bonds.⁶

§ 72. Proposition to name the amount of issue.—

When the statute under which the bonds are to be issued requires that the proposition be first approved by the legal voters, and they are to specify the amount of the issue, a failure so to specify will render the vote nugatory, and *mandamus* will issue to restrain the issue,⁷ but if the bonds are issued such failure will not invalidate the bonds in the hands of a *bona fide* holder, if they contain proper recitals to estop the corporation.⁸

When the law requires the voters to specify the amount,

¹ Dill. on Mun. Corp. (4th ed.) : Fox, 28 P. R. 1078; Chicago K. & W. Co. v. Harris, 30 P. R. 456; 199 and n.

² Fraud must be set up before rights have accrued and the bonds issued. Butler v. Dunham, 27 Ill. 474; People v. San Francisco, 27 Cal. 655.

³ Humboldt Tp. v. Long, 92 U. S. 642. See Effect of Recitals herein.

⁴ See § 240.

⁵ Hutchinson & S. R. R. Co. v.

Fox, 28 P. R. 1078; Chicago K. & W. Co. v. Harris, 30 P. R. 456; Fidelity T. & S. U. Co. v. Morganfield, (Ky.) 29 S. W. R. 442.

⁶ See § 242 *et seq.*

⁷ People Nat. Bk. v. Pomona, 48 Kan. 55.

⁸ State v. Saline Co., 48 Mo. 390; George v. Oxford, 16 Kan. 72; Harding v. Rockford etc. Co., 65 Ill. 90.

the proposition cannot be submitted for or against any amount not exceeding a certain sum,¹ and wherever the body to pass on the question is required to specify the amount of money to be expended, or of the bonds to be issued for a particular purpose, it will not suffice for them to simply limit the amount.² Where a school-district board was authorized by statute to submit to the voters thereof the question of issuing bonds, the statute forbidding the issue above a fixed sum at a rate of interest not exceeding six per cent, and requiring them to be payable at a certain period, the notice did not state the time of payment or the rate of interest, the court restrained the issue.³

A proposition to issue \$460,000 worth of bonds or such lesser sum as may be sufficient was held to be valid, where the officers had power to issue bonds only to an amount sufficient to fund the indebtedness, which was \$419,180, and bonds to that amount were issued.⁴

Where a statute provided that a school district may, by a majority vote of its voters, issue bonds up to two-thirds of the costs of a proposed school-house, it was held that a vote which authorized the issue of bonds in excess of two-thirds of such cost is sufficient authority for the issue of bonds up to two-thirds of such cost.⁵

A proposition submitted to the voters and carried to issue bonds to "an amount not to exceed one million dollars" was held to authorize the city council to issue \$500,000 of bonds, and that the council had discretionary powers within the maximum amount.⁶

Where the word "may" is employed in the constitution or statute relating to the submission of the question to the taxpayers, it is deemed to be mandatory and should be read as "shall," and compliance with the terms of the statute in such cases is not optional.⁷

¹ State v. Saline Co., 45 Mo. 212; ⁴ Baker v. City of Seattle, 26 Pac. Mercer Co. v. Pittsburg & E. R. Rep. 462.

R. Co., 27 Pa. 389. ⁵ Vaugh v. School Dist. No. 31,

² Mercer Co. v. Pittsburg etc. (Or.) 39 Pac. R. 393.

R. R., 27 Pa. St. 389.

⁶ Winter v. City Council of Mont-

³ State v. School Dist. No. 1,gomery, 65 Ala. 403.

(Mont.) 38 P. R. 462.

⁷ Portland R. Co. v. Standish, 65

§ 73. **Proposition must be distinct and separate.**—The question must be submitted so as not to confound it with another,¹ as in the case of *Fulton Co. v. The M. & W. R. R. Co.*,² wherein Walker, J., said “that the law did not authorize the submission of a proposition for subscription of a gross sum to two roads, in the same submission, in such a manner that the voter had no option to vote for the one and against the other. This submission was made in this manner. It is proposed to subscribe one hundred thousand dollars, one fourth to this and three-fourths to another road, and the voter, however much in favor of the one and opposed to the other, was compelled to vote either for or against the entire subscription.”

In the case of *McBryde v. City of Montesano*, 34 Pac. Rep. 559, the facts disclosed that two distinct propositions had been submitted, one to fund \$20,000 of old debts, and the other to borrow \$5,000 for future purposes, and only one ballot was used, so that the voter had no opportunity to express himself separately as to each, the whole election was held void.³

When the proposition to issue the bonds is for an amount in excess of the limitation, the bonds, if issued, are void because the proposition is an entirety and indivisible, and the election is simply a void act and confers no power on the officers to issue the bonds.⁴

In another case, where the assessment roll was filed so soon before an election that it was not ascertained until after the election that the proposed issue exceeded the limitation, the court held the election to be valid as to the

Mo. 63; *Gulf etc. R. Co. v. Miami* tures shall be made by the county
Co., 12 Kan. 230; 14 Am. & Eng. courts . . . the county court *may*
Ency. of Law, 979. In *Stienes v.* for the purpose of information sub-
Franklin Co., 48 Mo. 167, the court mit the amount to the voters.” etc.
held that when the rights of third ¹ *Peoria & O. R. R. v. County of*
persons are involved or the public Tazewell, 22 Ill. 156.
good requires it the word “*may*” ² 21 Ill. 328.
used in law should always be con- ³ *Truelson v. Mayor of Duluth*,
strued to mean “shall,” and it ap- (Minn.) 63 N. W. R. 714.
plied this construction to a statute ⁴ *Reinemann v. C. & C. R. Co.*, 7
authorizing the issue of bonds Neb. 310.
which read, “Before any expendi-

amount within the limitation, and restrained the issue only as to the excess.¹

§ 74. **How submitted.**—When the statute is silent as to the mode of proceeding by the common council for submitting the proposition to the voters, the same may be submitted by a resolution instead of an ordinance,² but where the statute or charter of the city requires such a submission to be done by ordinance, it must be signed, recorded and published as required by such statute or charter, or the bonds will be void.³

After the bonds are issued and are in the hands of *bona fide* holders the mode of submission cannot usually be questioned. As where three distinct propositions were submitted in one, so that the taxpayers were unable to vote upon any one alone, and the bonds were issued and passed into the hands of innocent holders, the court held it too late to raise the objection that the proposition was improperly submitted.⁴

Where the submission of such questions is regulated by the constitution, a material variation of the statute from the constitution would be fatal, as where a statute authorized the submission of the question of aid to a railroad to the resident taxpayers, and the constitution required all such propositions to be submitted to the electors, the authorization of the resident taxpayers was held to be void.⁵ And where the statute permitted the issue of bonds if "two-thirds of the qualified voters voting at such an election" should assent, the statute was declared unconstitutional, because the constitution prohibited such issue, unless assented to by two-thirds of the qualified voters of the municipality.⁶

Where the law required that the amount of stock necessary when a municipality was authorized to subscribe for stock in a private corporation and the amount of the

¹ Seymour v. Tacoma, 33 P. R. 1679.

² City of Alma v. Guaranty Sav. Bank, 60 P. R. 203.

³ Nat. Bank of Commerce v. Town of Granada, 54 P. R. 100.

⁴ Meyer v. Mesentine, 1 Wall 393.

⁵ Plainview v. Winona Co., 36 Minn. 224.

⁶ Harshman v. Bates Co., 92 U. S. 569. For cases on manner of submission of question, see 22 Am. & Eng. Corp. Cas. 54, n.

bonds to be issued be named, it was held that the bonds could not issue because the proposition submitted did not state the amount of the bonds to be issued.¹

It is only necessary to submit to the voters those matters directed to be submitted by the statute, and where unnecessary matter is submitted the council is not bound to follow the proposition voted on by the people as to such surplusage.²

Where it was intended to purchase a plant for electric lighting and pay for the same by the issuance and sale of bonds, it was held lawful to submit the entire matter in one proposition.³

§ 75. **Same.**—Where the ordinance for election showed that the question to be submitted was, whether the floating debt of a municipality should be funded, and a record of the canvassing board showed that a majority of the electors voted to fund the debt, and there was nothing of record to show the record was defective, it was held that bonds issued pursuant to such submission and vote were not invalid, although the notice of election was for the proposition to issue water bonds.⁴

The statute sometimes provides that the proposition contained in the notice of election must state the amount of the tax levy to be made for the payment of the bonds. It has been held that this provision was satisfied where the ordinance calling such election stated that the bonds shall be "serials," that one-twentieth of the whole indebtedness would be paid each year, including interest at six per cent payable semi-annually, and that "the tax levy for the payment thereof amounts during the full period of twenty years to \$97,800" for water-work bonds, and to \$40,750 for sewer bonds.⁵

§ 76. **When propositions may be submitted.**—The question may be submitted at the regular election of the

¹ People's Nat. Bk. v. Pomona, 28 P. R. 1089. See also People v. Baker, 23 Rep. 364.

² Yesler v. City of Seattle, 1 Wash. 308.

³ Thompson H. E. Co. v. City of Newton, 42 F. R. 723.

⁴ Nat. Bank v. Town of Granada, 41 Fed. Rep. 87.

⁵ E. M. Darby Co. v. City of Modesta, 38 Pac. Rep. 900.

municipality, unless the statute requires that it be submitted at a special election called for the purpose.¹

When the statute requires that it be submitted at a regular election, a vote taken at a special election is ineffectual.² Where the statute provided that "no vote shall be taken unless at a regular election of town or county officers," a vote taken at any election for either town or county officers was held good.³

The annual charter election held for the election of municipal officers, though no State or county officers are to be chosen, is a general election, at which a proposition may be submitted to the legal voters, unless the act otherwise directs.⁴

Unless the statute which authorized the submission of the proposition to the voters shows a contrary intent, the question may be re-submitted, although once or more prior thereto voted down.⁵

§ 77. **Notice and time of election.**—The notice of election must be given by the proper officers, or the bonds will be void, even in the hands of innocent holders,⁶ unless the bonds contain recitals made by officers of the municipal corporation who are authorized to pass upon the question which will estop it from the setting up the irregularity,⁷ and it also may be estopped by its own laches or records.

The resolution or ordinance authorizing the submission

¹ *Union Bank v. Board etc.*, of Oxford, (N. C.) 21 S. E. R. 410.

² *Pana v. Lippincott*, 2 Ill. App. 406.

³ *Edwards v. People*, 88 Ill. 340.

⁴ *People v. Town of Berkeley*, (Cal.) 35 P. R. 591.

⁵ *Demid v. Clarke Co.*, 51 Mo. 58; *Soc. for Sav. v. New London*, 29 Ct. 171; *Woodward v. Calhoun Co.*, 2 Cent. L. J. 396; *contra*, *Com'r's v. Tinsler*, 94 U. S. 611.

⁶ *Town of Jacksonville R. Co. v. Virden*, 104 Ill. 339.

⁷ *Pana v. Bowler*, 107 U. S. 529; *Knox Co. v. Aspinwall*, 21 How. 539.

In *St. Joseph Tp. v. Rogers*, 16 Wall. 611, one of the points relied upon by the defence was that the town meeting was called and held before the act was passed providing for the election and issue of the bonds.

The court held that as the statute made it the duty of the supervisor who issued the bonds to pass upon the question whether an election had been properly held, and as the bonds issued by him contained proper recitals, the township was estopped to set up the defence. Not so in Illinois. See note 4 to § 68, *supra*.

of a proposition to the voters for their approval must provide for the giving of a notice of the time and place of election, unless such time and place is regulated by the enabling act, and if such provision is not made, the city clerk or other officer cannot cause a notice to be given designating such time and place.¹

When the statute fixes no time for the holding of the election, the legislative body may, unless the act designates some other body or person, fix the time and place of holding it,² and if the persons empowered to call an election refuse so to do, *mandamus* will issue to compel them to call one,³ unless it is discretionary with them whether they will call it or not.⁴

The notice must be clear and intelligent and give information of the time of the election and of the proposition to be voted upon, so that the voters may have full knowledge of the proposition, and in case of an affirmative vote, the officers of the municipality may know what the wish of the people is, and what they themselves, by the vote, were authorized to do.⁵

The full time of notice must be given, and where thirty days' notice was required of the time of election and it was held eighteen days after the act took effect, and the bonds were issued twenty-five days thereafter, both the election and the bonds were held invalid.⁶ Until the proper notice is given the people have no right to vote. The length of time of notice is as much a part of the preliminary steps as the election itself, and a failure to give the proper notice may render the bonds void.

When the enabling act is silent as to the length of time and kind of notice to be given of an election, and there is a provision in some general law which requires the kind and length of notice to be given before a municipal corporation incurs a debt, the notice must conform to this general law.⁷

¹ Thompson v. City of Sumner, 37 P. R. 450.

² Dill. on Mun. Corp. Vol. 1, § 194.

³ *Ib.* §§ 179, 838.

⁴ Cooley on Const. Lim. 603.

⁵ Cooley on Const. Lim. 303.

⁶ George v. Oxford Township, 16 Kan. 72.

⁷ Bowen v. Greensboro, 79 Ga. 709; Union Bank v. Oxford, (N. C.) 24 S. E. R. 410; Post v. Co. of Pulaski, 47 Fed. R. 282.

Failure to give proper notice is not fatal to an election if there was full knowledge thereof and a full vote.¹

An ordinance which provided for an election to issue bonds required the city clerk to publish the election notice for thirty days next preceedingsaid election, and to post the same for a like period at certain places. It was held that it was a substantial compliance where the notice was posted twenty-six days prior to election and published for thirty days, but not on the day preceeding the election, it not being claimed that the omissions had any effect on the result.²

Where a notice stated that the election would be held in two separate places, when but one place could be named, thus rendering it uncertain where the election would be held, the election was held to be void.³

§ 78. **Publication of notice.**—Where the notice is to be given a certain number of weeks prior to election, publication once each week is deemed sufficient.⁴

The manual act of posting need not be done by the officers required to give the necessary publication and posting: it may be done by others for them.⁵

Notice signed by the clerk is sufficient, if done by order of the board authorized to call the election.⁶

When the statute required thirty days' notice, the issue of the bonds was restrained for failure to give notice, although a majority voted in favor of the proposition.⁷

§ 79. **Votes required to carry the proposition.**—The constitution or statute usually requires that the matter submitted for popular approval shall receive a majority or some other proportion of the legal or qualified voters.

The courts in almost every instance have construed this to mean, without reference to any constitutional provision on the subject, a majority or other required pro-

¹ State v. Carrol, (R. L.) 24 Alt. 147 U. S. 91; *In re Woodbridge*, 30 Mo. App. 612.

² Seymour v. Tocomo, 33 P. R. 1059. ⁵ Philips v. Town of Albany, 58 Wis. 310.

³ People v. Caruthers, (S. D.) 36 P. R. 396. ⁶ Lawson v. Milwaukee & R. Co., 30 Wis. 597.

⁴ Knox Co. v. Ninth Nat. Bk., ⁷ Harding v. Rockford etc. R. Co., 65 Ill. 90.

portion of the legal voters, voting at the election when the question is submitted, unless otherwise provided.¹

Chief Justice Waite in *Cass Co. v. Johnston*, 95 U. S. 369, said: "All the qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed."

And in *Louisville and Nashville R. R. Co. v. County Court of Davidson Co.*, 1 Sneed, 637-696, the court said:

"How can we know how many legal voters there are in a county at a given time? We cannot judicially know it. If it were proved that the vote were much larger than in the last preceding political election, or by the last census by the official returns, or the examination of witness, it would be only a circumstance, certainly not conclusive. But we put our decision of that question on a more fixed and stable ground.

"When a question at an election is put to the people, and is made to depend upon a majority, there can be no other test of the number entitled to vote but the ballot-box.

"If in fact there be some or many who do not attend and exercise the privilege of voting, it must be presumed that they concur with the majority who do attend, if indeed they can be known at all to have an existence."

When the question was submitted with other questions, it was held, in *Illinois and Wisconsin*, that to be carried it must receive a majority of all the votes cast, and not a bare majority of the votes cast for or against that particular question,² but in *California* under art. 11,

¹ *Metcalf v. Seattle*, 25 Pac. Rep. 1010; *State v. Snodgrass*, 25 Id. 104; *Smith v. Proctor*, 130 N. Y. 319; *Day v. Austin*, 22 S. W. R. 757; *St. Joseph Town v. Rogers*, 16

Wall. 664; *McCrory on Elections*, 133; *Am. & Eng. Ency. of Law*, Vol. 15, 1297. See *People ex rel. v. Trustees*, 70 N. Y. 28-33.

² *People v. Winant*, 48 Ill. 263; *State v. Winkelmeier*, 35 Mo. 103.

sec. 6, of the constitution of that State, it was held that a majority of all the electors voting at such election, and not a majority of the electors voting on the question submitted, was required,¹ but in the case of *City of South Bend v. Lewis*, (Ind.) 36 N. E. R. 986, it was held that a majority of the voters voting in favor of the proposition was sufficient, although the proposition was submitted on a day set for the regular election for city officers.

It would seem that a majority of those voting on the particular subject should be sufficient to carry it, upon the same principle that a majority vote on any proposition is sufficient, because all have an opportunity to vote, and those who do not choose to avail themselves of the opportunity should be held to assent to the expressed will of the majority of those who do.

It has been held that the rule that but a majority or other proportion of the votes cast is sufficient to carry a proposition, although the registry lists show a greater number of electors entitled to vote than those who attended and voted.² This is the rule when a public officer is balloted for, and there can be no reason alleged for a different construction, when the assent of the taxpayers is required to a proposition, unless the constitution or statute requires such other assent.³

§ 80. **Constitutional requirements.**—When the con-

¹ *People v. Town of Berkley*, 36 N. E. R. 591. a majority of the votes in each township.

² *People v. Garner*, 47 Ill. 246.

Where an act in Indiana authorized the several townships through which a gravel road ran, to purchase the same and issue and sell negotiable bonds for the purpose, if a majority of the voters voted in favor of the proposition, it was held (*Gilson v. Board of Com'rs of Rush Co.*, 128 Ind. 65) that one petition for all the townships was sufficient, and but a majority of all the votes cast in all the townships was necessary, and not

It was also contended in this case that the act was in violation of the State constitution which provided that "the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation of all property both real and personal." On this point the court held, that so long as the rate of tax is uniform in the taxing district, it was not in violation of said section, and cited *Bright v. McCullough*, 27 Ind. 223; *Bowles v. State*, 37 Ohio St. 35; *Cooley on Tax.* (ed. 1876) 113.

stitution of the State requires that the assent of the taxpayers or qualified voters be obtained before bonds may be issued or a debt incurred, it has been held in a number of cases that the assent of a majority of all the voters in the municipality to be affected must be obtained, and that a majority of the votes cast at the election is not sufficient to give assent.¹

The rulings of the various State courts on this subject are not uniform, and the United States courts have followed the rulings of the State courts,² and when the latter have changed have refused to follow.³

When the bonds were issued upon a vote of a majority of those voting, the United States Supreme Court has refused to follow a subsequent decision of the highest court of the State, which declared the bonds to be void because a majority of all the "qualified voters" did not vote to issue the bonds,⁴ it being a rule of the Federal courts, when not controlled by the decision of the State courts in the construction of their constitution and statutes, that if a majority of the voters at the election give their consent, that such a vote is sufficient authority for a municipality to carry out the provisions of the enabling act and issue the bonds.⁵

The constitution of Georgia provides that no bonded indebtedness for the establishment of certain improvements shall be incurred by any municipal corporation without the assent of two-thirds of the qualified voters thereof. It was held that the provisions in the Code (§ 508), that in estimating whether or not two-thirds of the voters have voted in favor of such indebtedness, the

¹ *Hawkin v. Carrol Co.*, 50 Miss. 735; *Duke v. Brown*, 96 N. C. 127; *Bayard v. Klinge*, 16 Minn. 249; *State v. Harris*, 96 Mo. 29; *contra*, *Gillespie v. Palmer*, 20 Wis. 514; *People ex rel. v. Warfield*, 20 Ill. 159; *Am. & Eng. Ency. of Law*, Vol. 15, 1279.

² *Cass Co. v. Johnston*, 95 U. S. 360.

³ *Douglass v. County of Pike*, 101 U. S. 677.

⁴ *Knox Co. v. Ninth Nat. Bk.*, 147 U. S. 91-99; *Carrol Co. v. Smith*, 111 U. S. 556. See also *Madison Co. v. Priestly Treasurer*, 42 Fed. Rep. 817. The court in these cases held that two-thirds of the qualified voters meant two-thirds of those voting.

⁵ *St. Joseph Tp. v. Rogers*, 16 Wall. 614; *County of Cass v. Johnston*, 95 U. S. 360.

judges of election shall base their calculation on the votes cast at the last previous election, was constitutional, and that bonds issued under such votes were valid.¹

If the act authorizing the issue of the bonds is in conflict with the State constitutions, the bonds will be declared void even in the hands of innocent holders. Thus in a case where the act authorized the issue of bonds "if two-thirds of the qualified voters of the township voting at such an election are in favor of the subscription," the constitution of the State (Missouri) prohibited such subscription "unless two-thirds of the qualified voters" of the municipality making the subscription "shall assent thereto," bonds issued pursuant to the vote required by the enabling act, two-thirds of the voters who voted at the election, were held void.²

When the bonds contain proper recitals made by the officers whose duty it was under the law to ascertain the fact that the necessary number of voters voted in favor of the proposition to issue the bonds, a *bona fide* purchaser will be protected, and the municipal corporation cannot set up the defence that the proposition did not receive the requisite number of votes as required by the constitution.³

§ 81. **The word "inhabitants" and other terms construed.**—The expression, the "inhabitants," means the legal voters, and a majority of such votes is sufficient,⁴ and "voters" and "electors" are held to be the same.⁵

The term "qualified electors" means those whose competency have been passed upon on their admission to registration.⁶

In North Carolina it is held that the term "qualified electors" means the registered voters of the previous

¹ Bell v. City of Americus, 79 Ga. 152, 3.

² Harshman v. Bates Co., 92 U. S. 569.

³ Vickshunzh v. Lombard, 51 Miss. 111; Board of Supervisors of Madison Co. v. Brown, 67 Miss. 684.

⁴ Walnut v. Wade, 103 U. S. 695; Day v. Austin, 22 S. W. R. 757.

⁵ Everitt v. Smith, 22 Minn. 53; *contra*, Sanford v. Printice, 28 Mo. 358.

⁶ McDowell v. Mass R. & C. Co., 96 N. C. 514; Webb v. Lafayette Co., 67 Mo. 354.

election, and that, unless authorized by statute, a municipal corporation cannot order a new registration.¹

Where bonds were authorized by statute to be issued, if two-thirds of the qualified voters voting at such an election should consent, such statute was held to be unconstitutional, because repugnant to the State constitution, which required such consent to be given by two-thirds of the qualified voters of the municipal corporation.²

Where a statute authorized a county to aid a railroad, if a majority of the *holders of real estate* should vote in the affirmative, it was held that a submission of the proposition to *all* the voters of the county was illegal, and that the levy of a tax to pay such aid was invalid.³

It has been held in South Carolina that an act authorizing females to vote at an election upon the question of issuing bonds by a municipal corporation, or incurring a debt, is constitutional.⁴ Statutes of like nature in New Jersey have also been held constitutional.⁵

§ 82. **How result should be declared.**—When the enabling statute provided that the result of the election must be declared by a certain board, the result should be clearly stated, so that it may appear that a majority or other necessary proportion of the vote was cast for the proposition submitted.

In one case, where the board declared, “that after due canvass the foregoing returns of election are correct,” the court held it was not a proper return, and did not declare the result of the election, and therefore the issue of the bonds was restrained.⁶

And in another case, where the record recited that “the taxable inhabitants aforesaid voted,” without finding or reciting that a majority voted in favor of the proposition, it was held insufficient.⁷

¹ *Smith v. Wilmington*, 98 N. C. 343. City Council, 39 S. C. 397; 40 S. C. 290.

² *Harshman v. Bates Co.*, 92 U. S. 569. ⁵ *Kimball v. Hendee*, 30 Atl. Rep. 894.

³ *Bullock v. Curry*, 2 Metc. (Ky.) 174. ⁶ *Claybrook v. Board of R. Co.*, (N. C.) 19 S. E. R. 593.

⁴ *Woodley v. Town Council of Ohio*, 22 S. E. R. 410; *Wilson v.* ⁷ *Deland v. Platt Co.*, 54 Fed. Rep. 823.

§ 83. **Proposition as carried cannot be changed.**—The general effect of an affirmative vote is to empower the proper officers, or the municipal corporation, to proceed and carry into execution the act authorized to be done in the enabling statute.¹ And the proposition as accepted by the people must be followed, and the provisions of the proposition as submitted and accepted cannot be changed or departed from, by either the officers charged with the duty of issuing the bonds or making the subscription, or by the legislative body of the municipality, and in case such a change be made the issue of the bonds will be restrained.² The people themselves cannot, without special authority, waive the conditions, although they vote to do so,³ but where the bonds are issued and are in the hands of a *bona fide* holder the conditions have, in a number of cases, been considered waived, and the bonds held to be valid.⁴

In a case in Michigan, where the voters authorized a loan to be paid in instalments extending over a period of thirty years, and the supervisors, who were authorized to make the loan and issue the bonds, disregarded the time as authorized and made an issue of bonds, all of which were payable in fifteen years from their date, it was held the bonds were void.⁵ It has been held that when the proposition submitted was for interest annually, the council cannot issue the bonds with interest semi-annually, and that in such a case the issue will be restrained, and the bonds are invalid while yet undelivered.⁶

When matters are submitted to the voters which the statute does not require to be submitted, in such a case the proposition as to such matters need not be followed,

¹ *People v. Batchellor*, 53 N. Y. 128.

² *Town of Plattville v. Galena*, 43 Wis. 493; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526; *Hodgeman v. Chicago St. P. R. Co.*, 20 Minn. 18; *contra*, *Coleman v. Marion Co.*, 50 Cal. 493.

Illinois M. R. R. Co. v. Waynesville, 88 Ill. 469.

⁴ *Chiniquy v. People*, 78 Ill. 570; *Melvin v. Lisenby*, 72 Ill. 63; *Skinner v. Santa Rosa*, 40 P. R. 742; *E. M. Darby & Co. v. City of Modesta*, 38 P. R. 900.

⁵ *McMullen v. Ingraham*, Cir. J., (Mich.) 61 N. W. R. 260.

⁶ *Skinner v. Santa Rosa*, 40 Pac. R. 742.

but may be changed at the pleasure of the board authorized to issue the bonds.¹

When the proposition empowers the officers named in the enabling act to issue the bonds or other evidence of indebtedness after an affirmative vote has been taken, the officer or officers named, or the municipal body, have no discretion but to carry out the proposition, unless the act itself clothes them with discretion, and it is held that the act of the officers in such cases is ministerial.²

Where there was a delay of seventeen months between a vote in favor of the issuance of school-district bonds and their issue, due to financial stringency, it was held that such delay did not invalidate the bonds.³

§ 84. **Affirmative vote not a contract.**—The vote of the people does not make a contract, unless the act itself expressly so provides,⁴ as the object of the act is to empower the officers of the corporation to enter into a binding contract,⁵ and until they themselves enter into such contract or make a subscription by signing, or by resolution, or ordinance, the municipality is not bound,⁶ and the authority may be repealed or changed.⁷

When it is apparent that the statute authorizing the issue of the bonds and the vote, taken together, authorize an issue of bonds, it has been held that bonds so issued without an order of the court were valid.⁸

A statute can be so framed that upon an affirmative vote the officers named in the act would be at once empowered to issue the bonds, without the necessity of the legislative body of the municipal corporation adopting a resolution or ordinance providing for their issue.

¹ Yeasler v. City of Seattle, 1 Wash. 308.

² People v. Logan Co., 63 Ill. 374; Piatt v. People, 29 Ill. 51; St. Joseph etc. R. R. Co. v. Buchanan Co. Court, 39 Mo. 485.

³ Miller v. School Dist. No. 3, (Wyo.) 39 Pac. R. 879.

⁴ Gunn v. Barry, 15 Wall. 610.

⁵ People v. Batchellor, 53 N. Y. 128.

⁶ Moultrie v. Rockingham Bank, 92 U. S. 631; People v. Ohio Grove, 51 Ill. 192.

⁷ See chapter on Proceedings to Issue Bonds.

⁸ Livingston v. First Nat. Bk., 128 U. S. 102.

CHAPTER VII.

PROCEEDINGS TO ISSUE BONDS BY MUNICIPAL BODIES.

SECTION.	SECTION.
85—The statute must be strictly followed.	91—When the mayor may vote.
86—Resolution or ordinance necessary.	92—Readings, number required—Publication between—Amendments material cannot be made.
87—Why necessary.	93—Approval by the mayor, when necessary—If he neglects or refuses when ordinance takes effect—Veto, how to be made—Effect of.
88—When a resolution is sufficient, if ordinance not required.	94—Publication, of ordinance—Effect of non-publication—Publication, when not necessary.
89—What the ordinance should provide for—Same remarks apply to a resolution, when it may be used.	95—Record of proceedings—What it should contain.
90—Enactment—At what meetings ordinance may be passed—When ayes and nays must be called—Number of votes necessary.	

§ 85. **The statute must be strictly followed.**—Whether the authority to issue the bonds is vested in the legislative body of the municipality, as the common council or board of aldermen of a city, town or borough, or the board of freeholders or county commissioners of a county, or the town committee or trustees of a township, or the school-district board of a school district, or in the county court of a county, or in the officers named in the enabling act itself, the mode of proceeding provided for in such act must be strictly followed by the officers or body authorized to issue the bonds, and all the steps prior to their issue must have been performed in the manner required by the enabling statute or any general law relating thereto, or any provision of the State constitution imposing limitations in relation to the issue of the bonds; otherwise their issue will be restrained, or, if issued, the bonds in many cases are held invalid. As the preliminary steps prior

to the actual proceedings of the corporation relative to the issue of the bonds, as the petition of taxpayers, submission of the question to the voters, the election, the vote, the effect of the vote, have been treated of in the preceding chapter, this chapter is devoted to the proceedings necessary to be taken by the legislative body of the municipality in order to provide for the issue of the bonds, assuming it to have been authorized to issue the bonds by an affirmative vote or other necessary prior proceedings, if such prior authority were necessary in order that the municipality might act. When the enabling statute does not designate what body shall issue the bonds, but merely authorizes a city, or a city of a certain class, or a town, or other municipality, to issue for the purpose expressed in the act, the presumption is that it intends to empower the legislative body of the municipality to issue the bonds,¹ unless some other body has authority to issue bonds for the purpose expressed in the act.

Usually the affirmative vote of the taxpayers merely authorizes the legislative body of the municipality to proceed and issue the bonds, and such bonds cannot be issued by the ministerial officers designated in the act until such board authorizes the issue, and if issued without such authority the bonds are void.² A statute, however, may be enacted, unless prohibited by the constitution, which will empower the ministerial officers or the officers designated in it to at once issue the bonds after an affirmative vote, or without one, and in some of the large cities the financial officers are so authorized.³

¹ *In re Wetmore*, 99 Cal. 146.

² *Swan v. City of Arkansas* (1894), 61 Fed. Rep. 478; *Portsmouth Sav. Bk. v. Village of Ashley*, 91 Mich. 670; *Brown v. Bon Homme Co.*, 46 N. W. R. 173.

³ Under the New York City Consolidation Act of 1882, the negotiable paper issued by the city is to be known as "Consolidated Stock of the City of New York." Sec. 132.

The faith and credit of the mayor, aldermen and commonalty of the

city shall be pledged for the redemption and payment, and the stock must bear on its face a reference to the act by which its issue is authorized.

It shall be signed by the mayor and comptroller, and sealed with the corporate seal, and attested by the clerk of the board of aldermen. Sec. 133.

It may be registered or coupon stock in sums not less than \$500, each share, payable in gold coin or

Where the original statute authorizing the issue of bonds contains certain restrictions as to the mode of proceeding to be followed in the issue of the bonds, or if the charter of the municipal corporation provides that certain steps be taken in the issue of bonds, a subsequent amendment to the original act in the first instance extending the amount of the issue or a mere authority in the latter to issue bonds for a designated purpose, will not authorize a departure in the proceedings relative to the issue of the bonds from the course marked out in the original act or charter, unless the subsequent act or acts indicate that a different course may be pursued.¹

in the legal currency of the United States, at the option of the comptroller, and be redeemable at a period of not less than twenty years or more than fifty years from the date thereof, and to bear interest not exceeding six per cent per annum, payable quarterly or semi-annually in New York City, or any other place fixed by the comptroller at the time of the issue of said stock. Sec. 131.

Bonds issued in exchange for bonds issued prior to April 16th, 1877, may be issued in the denomination of \$20, \$50, \$100, \$500, and upwards, preference in such cases to be given to bidders for the smallest denomination.

The commissioners of the sinking fund, when authorized by an ordinance of the common council, may, by a concurrent resolution, exempt from city and county tax (but not State tax) all bonds issued since June 9th, 1880, provided the rate of interest does not exceed four and one-half per centum per annum; the bonds shall state on their face that they are exempt from such tax and refer to the section of the charter and to the ordinance of the common council and the resolution,

of the said commissioners. Sec. 137.

The bonds or stock are issued by the comptroller in some cases when directed by the commissioners of the sinking fund (sec. 143) and others when directed by the commissioners of estimate and apportionment (secs. 139, 141, 142), and in some cases the comptroller may issue the stock without authority from any board so to do (secs. 140, 145, 149, 153, 154, 155), although it is the custom of the comptroller in the latter case to secure the approval of the board of estimate and apportionment for the issue of such bonds.

¹ Mayor v. Wetumpka Wharf Co., 63 Ala. 611.

In this case it appeared the original act provided that "no bond shall be issued but upon an entire concurrence of the board of mayor and aldermen, upon full attendance of all the members of the board, and when there is no vacancy, which shall be manifested only by an entry of the order for issuing being made on the minutes of the board and signed by each member thereof."

The original act permitted the

§ 86. **Resolution or ordinance necessary.**—The act of the legislative body in providing for the issue of bonds is a legislative one, and must be exercised and evidenced by either a resolution or an ordinance, and if the bonds are issued without the adoption of such a resolution or ordinance, when required by charter or some statute, there is a want of power, and the bonds will be void notwithstanding any recital.¹ And where the charter of the municipality or the laws authorizing the issue of the securities require that its legislative acts be done by ordinance, then an ordinance providing for their issue must be passed, and the same either approved by the mayor or other designated officer, or passed over his veto, as the case may be, and published as required by law. In other words, all the steps required by the charter of the corporation or other laws to enact an ordinance and make it operative must be performed.

§ 87. **Why necessary.**—Usually the enabling act under which the bonds are proposed to be issued authorizes the municipality, if it is deemed necessary by its officers, or its legislative body, or its financial board, as the case may be, to issue bonds to provide means for the public purpose designated in the enabling act. The maximum amount of the bonds that may be issued, as well as the maximum rate of interest, are usually stated in the act.

Sometimes the officers to execute the bonds are named, but the form of the bond, the denomination of the issue, are not usually provided for in the act. Usually the act is so drafted that, until the authorities of the municipality desire to take advantage of it and issue the bonds for the public purpose authorized, the act is dormant, so to speak, as to a particular municipality.

issue of bonds for the construction of a canal, etc.

An amendment to the act was passed extending the amount, and permitting the money raised from the sale of the bonds to be used for any internal improvement.

The court held a bond containing a recital of the amended act, and

in the hands of a *bona fide* holder, issued under the amended act to be invalid, because the proceedings marked out in the original statute were not followed.

¹ *Swan v. City of Arkansas*, 61 Fed. Rep. 478; *Nat. Bank of Commerce v. Granada*, 10 U. S. Appeals, 692.

When it is desired to issue the bonds for the purpose provided, then it becomes necessary that such determination should be evidenced by some action of the municipality, and when the authority to issue is lodged with the legislative body of the municipality, the determination being a legislative one,¹ it must be evidenced in the manner provided in the charter for the adoption or passage of legislative acts, and such action must provide for the amount of the bonds to be issued, the rate of interest, the persons who are to execute the bonds, and all the other necessary details relating to the issue.

Where the act authorizing the issue of bonds required that they should be issued only after an ordinance therefor should be passed, it was held that bonds issued by the mayor, attested by the city clerk and under the corporate seal, were void, because an ordinance providing for such issue was not passed.²

§ 88. **When resolution sufficient.**—The general rule is that when the charter commits the decision of a matter to the council, but is silent as to the mode, the decision may be evidenced by a resolution and need not necessarily be by ordinance;³ but where the charter requires that the decision be evidenced by an ordinance, then an ordinance must be passed⁴.

Where the mayor and common council are given authority to issue bonds, they may issue and sell the bonds by a resolution of the common council, and a resolution accepting a bid for the bonds cannot be revoked but will be forced by a *mandamus*. A resolution has ordinarily the same effect as an ordinance, and both are legislative acts.⁵

§ 89. **What the ordinance should provide for.**—Great care should be exercised in the drafting of the ordinance providing for the issue of the bonds. Its title should ex-

¹ Nat. Bk. of Commerce v. Town of Philadelphia, 35 Pa. St. 231; Green v. Granada, 11 Fed. Rep. 262-266. Bay v. Brauns, 50 Wis. 204.

² Swan v. City of Arkansas, 61 Fed. Rep. 478. ⁴ Newman v. Emporia, 32 Kan. 456.

³ Atchinson Board of Ed. v. De Kay, 118 U. S. 591; Butler v. Pas-saic, 44 N. J. L. 171; Sower v. ⁵ Smalley v. Yates, (Kan.) 26; Am. & Eng. Corp. Cases, 578.

press the general object of the ordinance, although if it does not, it will not invalidate the ordinance, nor will it be invalidated if it has no title, unless the charter of the city or some general law requires it to have a title.¹

Whether it be in the form of a resolution or an ordinance, provided it be passed with all the required formalities of an ordinance and be of sufficient scope, it will be in effect an ordinance.²

The ordinance need not recite the act of the Legislature which authorizes the municipal body to enact it; if it misrecite it, and the corporation has the power to perform the provisions of the ordinance, the misrecital will not affect the power.³

If the ordinance does not refer to the authority under which it is enacted, and should the bonds recite they were issued under a wrong act, if in fact the municipality had power to issue the bonds, they will, notwithstanding such misrecital, be valid obligations.⁴

The ordinance, as before stated, should be drawn with care. The title should state the object of the ordinance; then usually follows the introduction ordaining or enacting the ordinance, after which follows the scope and purpose of the ordinance. Here when the object is to authorize the issue of bonds, the bonds should be directed to be issued, the purpose of the issue should be stated, the amount to be issued, the denomination of the bonds, when they shall bear date, time and place of payment, the rate of interest and place of payment thereof, and the officer to make delivery of the bonds should be stated, although the place of payment, if not provided for in the ordinance or statute, may be stated in the bond at such place as the officers executing them select. The ordinance must also designate the officers, usually the mayor or other chief executive officer of the municipality, and the clerk, who are to execute the bonds. This is necessary unless the

¹ *Hershoff v. Beardsley*, 45 N. J. L. 279; *Creighton v. Morrison*, 27 L. 288; *City of Tarkio v. Cook*, Cal. 617.

(Mo.) 25 S. W. R. 202; *In re* ³ *Mayor etc. of Baltimore v. Ulman*, 30 Atl. R. 43.

Thomas, (Kan.) 27 Pac. R. 171. ⁴ *Knox Co. v. Ninth Nat. Bank*, 147 U. S. 91.

statute authorizing the issue designates such officers. The ordinance usually provides that the bonds be sealed with the corporate seal, although such direction is unnecessary, as it will be presumed that the officer so designated to execute the bonds have the authority to affix the seal of the corporation to them. When the authority to enact the ordinance depends upon the performance of a condition precedent, as the affirmative vote of the taxpayers and all the steps leading to such vote, or the publication of the intention to pass the ordinance or to issue the bonds, the ordinance need not recite the performance of the prior conditions unless required by statute.¹ When the statute or constitution requires that at the time of incurring the debt a sinking fund or an annual tax must be provided to pay the interest and principal, the ordinance or some other prior or contemporary one must make this provision. And when the act authorizing the issue of the bonds permits their issue when, in the judgment of the legislative body of the corporation, it is deemed advisable, the passage of the ordinance providing for their issue is conclusive evidence that, in the judgment of the body, the issue is advisable or necessary, and it need not, unless required, set out in express terms that determination.

When the bonds are to be paid out of a special fund, the ordinance must provide for such fund, and in case of a failure so to do, it would seem the bonds are void,² unless they contain recitals which will estop the corporation to show such failure.

It must always be borne in mind that the statute under which the ordinance is enacted is the authority for its enactment, and that the mode of procedure and the conditions precedent prescribed therein must be strictly followed.

What has been said above in reference to the scope and object of an ordinance providing for the issue of bonds applies with equal force to a resolution providing for their issue, when a resolution instead of an ordinance, or

¹ *Chates v. New York*, 7 Cow. 1. ² *Quaker City Nat. Bk. v. Nolan*, 585; *Kiley v. Forsee*, 57 Mo. 390; 59 Fed. Rep. 660. See §§ 136, 137, *Welker v. Potter*, 18 Ohio St. 85. 138.

as well as an ordinance, may be adopted for the purpose.

§ 90. **Enactment.**—The ordinance or resolution authorizing the issue of bonds must be adopted at a meeting of the legislative body authorized to adopt such an ordinance or resolution, and when the ordinance must be introduced at one meeting and passed at another, it cannot be passed at an adjourned meeting of the one it was introduced at, as the adjourned meeting is but a continuation of the former meeting.¹ At an adjourned meeting of a regular meeting any business that could lawfully have been transacted at the regular meeting may be transacted at the adjourned one, unless the charter or some general law prohibits.² When no quorum, a minority may adjourn a regular meeting to some other day.³

The proceedings to issue bonds must be conducted at legal meetings of the board, and the members cannot act separately, as by signing a paper, or otherwise authorize the issue of bonds.⁴

When a special meeting is held the only business that can be done is that named in the call for the meeting,⁵ unless all the members are present and consent to take up other business.

When the charter requires the vote of a certain number of the body authorized to pass or adopt the resolution or ordinance providing for the issue of the bonds, the ayes and nays should be called and recorded, in order to ascertain and establish by the records the fact that a sufficient number of the body voted for the passage or adoption of such resolution or ordinance, and when the charter requires a vote by ayes and nays such require-

¹ *Staats v. Washington*, 45 N. J. L. 318.

² *Smith v. Law*, 21 N. Y. 296.

³ *People v. Rochester*, 5 Lansing. (N. Y.) 142.

⁴ *Aikman v. School Dist.* 27 Kan. 129.

⁵ *St. Louis v. Withans*, 90 Mo. 646. See *Gill v. Dunham*, 34 Pac. R. 68; *Young v. Village of Rushsylvania*, 8 Ohio Cir. Ct. R. 75, as

to what notice is sufficient to members of special meeting.

If a special meeting be called all the members of the board must be notified of it and its object; if not so done the issue of the bonds will be restrained, (*Paola & Fall R. R. v. Anderson*, 16 Kan. 302.) and the bonds themselves may be declared invalid, unless afterwards ratified by the body.

ment cannot be dispensed with,¹ and when the proceedings of the body do not show a vote by ayes and nays there is no presumption that such a vote was taken,² although it has been held otherwise in several cases,³ but where the records show that the vote was unanimous, it is held to be a compliance with this requirement.⁴

Unless prohibited by the charter or some general or special law a majority of a quorum may, at a regular, or an adjourned regular meeting, or properly called special meeting for that purpose, adopt a resolution or ordinance providing for the issue of bonds.⁵ Usually, however, the charter, or some general law, requires the sanction of a greater number than a bare quorum in cases of this kind. If there be two branches or boards whose concurrent consent is essential to the passage of the ordinance or resolution, such concurrence must be by simultaneously existing bodies. And it has been held that the unfinished business of the two boards must be taken up anew.⁶

The mode of proceeding is regulated by the charter or some general law, and these should be inquired into in order to ascertain what is necessary relative to the enactment of an ordinance or resolution.

A regular or special meeting may be adjourned in the manner provided for in the charter, or some general or special law, or in the rules of the body itself. The clerk may be so authorized to adjourn a meeting, although no member of the board be present.⁷

§ 91. **When the mayor may vote.**—The charter often

¹ *In re* So. Market St., 20 N. Y. S. 831; *Sullivan v. Leadville*, 11 Col. 48; 48 Pac. Rep. 736; *Rich v. Chicago*, 59 Ill. 286; *Morrison v. Lawrence*, 98 Mass. 219.

² *Tracy v. People*, 6 Colo. 151; 203; *Martin v. Lemon*, 26 Conn. 192; *In re Buffalo*, 78 N. Y. 362; *Rich v. Chicago*, 59 Ill. 286; *Village of Belknap v. Miller*, 52 Ill. App. 617.

³ *Louisville v. Hyatt*, 2 B. Mon. (Ky.) 177; *Mayor v. New York*, 25 Wend. 693.

⁴ *New Albany Gas Light & Coke Co. v. Crumbo*, 37 N. E. R. 1062. See, however, *In re South Market St.*, 27 N. Y. 843.

⁵ *Charles v. Hoboken*, 3 Dutch. 291; *People v. Syracuse*, 63 N. Y. 411.

⁶ *Westmore v. Story*, 22 Barb. (N. Y.) 411.

⁷ *Atchison Bd. of Ed. v. DeKay*, 148 U. S. 598.

authorizes the mayor to vote in case of a tie, and it has been held that if one-half of the members of the council refuse to vote, and the other half vote in the affirmative, the mayor may treat those refusing to vote as opposed to those voting, and decide the question by casting his vote in the affirmative.¹

§ 92. **Readings—Amendments.**—The charter usually requires that the ordinance be read a certain number of times before final passage, and but once or twice at the first meeting and the remainder at a subsequent meeting. This provision is intended to prevent hasty legislation, and to give the citizens generally notice of what the legislative body of the municipality are doing. Sometimes the charter requires that the ordinance be published between the readings. All these directions are mandatory, and an ordinance passed neglecting them is void.²

The ordinance need not be passed by the same council that introduced it, and if after its introduction a new election is held it can be taken up where the old council left it, and read the balance of the required times, and finally passed.³

An ordinance cannot be amended in a material part or changed to embrace a different or enlarged subject.⁴ When any such change is contemplated or necessary the ordinance must be introduced as a new ordinance.⁵

§ 93. **Approval by the mayor—Veto.**—Unless the charter or some general law requires it, the ordinance need not be approved by the mayor, but where his approval is essential the ordinance will not be operative without it.⁶ In such cases his signature attached to the ordinance, stating that he approves it, must be made; his signature to the journal, unaccompanied by words of approval, has been held not to constitute an approval.⁷

¹ *Launtz v. People*, 113 Ill. 137.

² *Weill v. Kenfield*, 54 Cal. 111.

³ *McGraw v. Whitson*, 69 Iowa, 348; *Brown v. Lutz*, (Neb.) 54 N. W. R. 860.

⁴ *Staats v. Washington*, 44 N. J. L. 605.

⁵ *State v. Newark*, 30 N. J. L. 303.

⁶ *State v. Newark*, 25 N. J. L. 399; *People v. Schreder*, 76 N. Y. 160; *Nat. Bk. of Commerce v. Granada*, 54 Fed. Rep. 100.

⁷ *Graham v. Corondelet*, 33 Mo. 262.

He cannot delegate others to approve the ordinance for him.¹

When the charter merely directs him to approve ordinances, but does not make his approval essential to their validity, his failure to approve will not render the ordinance void.²

Usually the charter directs the clerk to present the ordinance to the mayor for his approval or disapproval, and directs that in case he disapproves of it, to return the same to the clerk of the council with his reasons within a certain number of days, and in case of failure so to return it, that the ordinance shall be as valid and binding as if he had approved of it.

In such cases he must, if he disapproves it, return it with his veto and his reasons, and in case he fails to return his reasons with the veto, the veto is inoperative.³

If he do return his veto and reasons within the proper time, the ordinance is thenceforth a nullity, unless, as is usually the case, the charter prescribes the mode of passing the vetoed ordinance over the veto, and after it is so passed the mayor cannot re-veto it, but the council so passing the ordinance over the mayor's veto must be the same one as enacted the ordinance.⁴

Sometimes the charter requires that the ordinance be signed by the president of the council, and it has been held that where the mayor was *ex-officio* such officer his signature as mayor was sufficient.⁵ When the mayor is absent, the approval of the official designated to act as mayor during the latter's absence or disability is sufficient.⁶

§ 94. **Publication—Effect of non-publication.**—Usually the municipal charter or some general law requires that before an ordinance takes effect it shall be published for a certain number of times and in certain papers.

¹ Lyth v. Buffalo, 48 Hun, 175.

² Blanchard v. Bissel, 11 Ohio St. 103.

³ Truesdell v. Rochester, 33 Hun, 574.

⁴ State v. Carr, 67 Mo. 38.

⁵ Becker v. Washington, 94 Mo. 375.

⁶ Salena v. City of Neosho, (Mo.) 30 S. W. R. 190.

In all such cases the publication is necessary, and until it is done in the manner pointed out the ordinance is inoperative,¹ and bonds issued pursuant to the provisions of such an ordinance are void in the hands of a *bona fide* holder, unless the bonds contain recitals made by officers whose duty it was to have the ordinance published which estop the corporation. A case in point is that of *National Bank of Commerce v. Town of Granada*, 54 Fed. Rep. 100.

A general law of Colorado (1887, p. 445, sec. 1) provided that all town ordinances should be recorded in a book for that purpose, and authenticated by the presiding officer of the board and the clerk, and all by-laws and ordinances should be published in some newspaper and should not take effect until the expiration of five days after they were so published.

It was held that an ordinance calling an election to authorize the funding of the floating debt of the town, which was passed but not recorded or published, never went into effect, and that the bonds authorized by such an election were void.

The court said: "This ordinance never having been published never went into effect. It had no more legal effect than if it had never been passed by the board of trustees."

The court also held that a recital in the bonds that they were issued under the ordinance did not estop the town from showing that the ordinance was never published and was therefore void, since neither the mayor nor clerk who signed the bonds had any duty to perform in relation to publishing ordinances or determining when they had been published according to law.²

When the choice of mode of publication is delegated to

¹ *State v. Orange*, 22 Atl. Rep. 1004; *In re Douglass*, 46 N. Y. 42; *Town of Stillwater v. Moor*, 33 Pac. Rep. 1024.

² The court in this case also said: "Here there was no ordinance in force under which the board of trustees or any other officer of the town could perform any act. The action of the mayor and clerk (who signed the bonds) was not simply irregular, but was without the sanction of any law. The point was never reached at which they could lawfully do any act under the supposed ordinance. It is a

the corporation, the clerk cannot make the selection,¹ but when no newspaper is specified, publication in the newspaper or papers which usually print the ordinances will answer,² and when the Legislature directs the manner of publication the ordinances can be published in no other way.³ If the statutes provide that a failure to publish shall not affect the validity of the ordinance they take effect from the date of the passage.⁴

Publication is not necessary if not required by the charter or some statute.⁵

The publication need not be printed in a paper devoted entirely to news, but may contain other matter. The ordinance should be published in full, especially so as to the scope and object of it, although a slight error in the printing will not invalidate it.⁶

The ordinance does not go into effect until after the last day of publication, and where the ordinance is to be published a certain number of weeks one insertion each week is deemed sufficient, and when it is to be published for a week one insertion is sufficient.⁷

When the ordinance is to be published so many days, Sundays and holidays are not excluded from the count, but it must be published the required number of days and times on days other than Sundays or holidays.⁸

case of total want of authority to do the act upon any conditions, and not a case where the authority to do the act existed, but the conditions precedent to the exercise of the authority were not observed. The statute which provides that ordinances shall not take effect until they are published is a public statute of which all persons are bound to take notice."

"There is then no authority for the issue of the bonds to which the coupons belong."

¹ Byers v. Mt. Vernon, 77 Ill. 167.

² Hastings v. Columbus, 42 Ohio St. 585.

³ State v. Mayor etc. of Hoboken, 38 N. J. L. 110.

⁴ Schweitzer v. Liberty, 82 Mo. 309.

⁵ *In re Guerrero*, 69 Cal. 88.

⁶ Moss v. Oakland, 88 Ill. 109.

⁷ Hoboken v. Gear, 27 N. J. L. 265; State v. Hardy, 7 Neb. 37.

⁸ *Ex parte Fiske*, 13 Pac. Rep. 310.

Parker, J., in the court below (48 Fed. Rep. 278), said:

"The statute requiring the publication of the ordinance was mandatory, and the ordinance without the requisite publication is a nullity, and consequently of no force or validity."

§ 95. **Record of proceedings.**—The record of the council or other legislative body in relation to the introduction, readings and passage of the ordinance should show in detail the proceedings.

It should in fact be a true account of all the proceedings of the council in relation to the ordinance.

In fact it must show compliance by the council with all the statutory requirements, and when the ayes and nays are necessary it must show the vote so taken, and when a certain number of the council is necessary to pass an ordinance it must show that the ordinance was passed by such a vote.¹ When, however the record shows that the ordinance was adopted by a unanimous vote, the ayes and nays need not be recorded.²

When the law requires that the ordinance as soon as may be after its passage be recorded in a book kept for that purpose and be authenticated by the signatures of certain officers, as the presiding officer, and the clerk and the mayor, the failure so to record before the issue of the bonds will not invalidate them. The passage of the ordinance can be proved by others means.³

What has been said above in reference to the proceedings of municipal bodies relative to ordinances applies with equal force to resolutions of such bodies providing for the issue of bonds, except that the formalities required for the adoption of a resolution are more simple, it being adopted at a single meeting, and usually requires no approval of the mayor or publication.

¹ *Olin v. Myers*, 55 Iowa, 209; *Strechert v. East Saginaw*, 22 Mich. 104.

² *Barr v. Auburn*, 89 Ill. 361.

³ *Nat. Bank of Commerce v. Granada*, 41 Fed. Rep. 87-91.

CHAPTER VIII.

FORMAL PARTS OF BONDS—HOW EXECUTED—COUPONS.

SECTION.

- 96—To whom made payable.
- 97—Place of payment—Rule in Illinois.
- 98—Number of the bonds, when material.
- 99—Denomination of the bond.
- 100—Date of bond—Effect if date of a Sunday.
- 101—Interest—Coupons represent it—When coupons draw interest—Effect if interest stipulated for exceeds the rate in enabling statute.
- 102—Time of payment—When bonds void, if time is changed.
- 103—Same—When act silent as to time—Bonds negotiable although payable at option of municipality before time stated.
- 104—How executed—Officers must be expressly authorized to do so—Must be in

SECTION.

- office at the time—Countersigning but a ministerial act.
- 105—Signing, what sufficient—Majority of board sufficient—Signing in blank.
- 106—Sealing, when necessary—Bonds without declared void, in what cases—Equity will afford relief if seal omitted—Scroll not a substitute—How seal proved.
- 107—Coupons are negotiable—Legislative authority to issue unnecessary—When must be produced.
- 108—Form of coupons.
- 109—When the coupons are to be governed by the terms of the bond—Coupons receivable for taxes.
- 110—Copies of bonds—And ordinances.

§ 96. **To whom made payable.**—The bonds are usually printed or lithographed upon fine paper or parchment, and the skill of the printer is expended to make them as elaborate and tasteful in appearance as possible. They usually have coupons attached for each half-year's interest until the principal of the bond is due.

They are either made payable to bearer, or to the party to whom they are issued or bearer, or to some officer of the corporation or bearer, or simply to bearer, and in such cases are transferable by delivery.

Sometimes they are payable to the order of a certain

person or corporation, and then they require the endorsement of such person or corporation.

Again they are payable to the holder, which means to bearer. Often they are made payable to a certain person or his assigns, in which latter case, in order to transfer them, such designated person may assign them either to some other designated person or in blank, and, if in blank, while they so remain, they are payable to the holder, and pass by mere delivery.

Again, they are issued with the payee's name in blank, and any holder may fill in his own name or pass them in blank, and until filled up such bonds pass by delivery.¹ Where the statute directs to whom the bonds shall be payable it has been held to be merely directory.²

The amount of the bond must be filled in before or at the time of delivery, and must be for a definite sum, and be payable at a certain time.

§ 97. **Place of payment.**—The place of payment of the principal and interest coupons may be either in or out of the State, and is usually at some well-known bank or banking-house or at the office of the treasurer of the municipality issuing the bonds. It has been held by the courts of Illinois³ that the place of payment must be within the State, unless the statute otherwise provides, but if payable out of the State, such stipulation does not render the bond void, but the treasurer need not comply with such condition and may pay the bond at his office.⁴ The courts of no other State have taken that view of the question. The Supreme Court of the United States, in a case in which objection to the validity of the bonds was raised because payable out of the State, held that "it was according to general usage to make such bonds (coupon bonds) and the coupons payable in the city of New York.

¹ Brainard v. N. Y. etc. R. R. Co., 25 N. Y. 496.

² Calhoun Co. v. Galbraith, 99 U. S. 214.

³ The People v. Tazewell Co., 22 Ill. 147; Johnson v. County of Stark, 24 Ill. 75. In this last case the court held that because the coupon was

payable in New York it did not render it void, but the payment could only be demanded at treasurer's office of the municipal corporation issuing it.

⁴ Endfield v. Jordon, 119 U. S. 680.

That it added to the value of the bonds and was a benefit to all parties. That the power of a municipal corporation does not depend upon the place of performance, but upon its scope and object."¹

The bonds usually refer to the statute which authorizes their issue and to the ordinance or resolution of the municipality providing for their issue, although such reference is not necessary to their validity, except in cases of estoppel for irregularities and over-issue treated of elsewhere in this book.

§ 98. **Number of bond.**—When the bonds are issued in a series they are usually numbered, and the coupons attached thereto are numbered to correspond with their respective bonds. It is held that the number is not a material part of the bond, and that its alteration or erasure will not affect the bond in the hands of a holder without notice;² but in the case of an over-issue of bonds it may become material, and if but a part of the bonds exceed the limitation, those sold before the limitation was exceeded, if they can be ascertained by their number or otherwise, may be collected.³

§ 99. **Denomination.**—Unless the statute pursuant to which the bonds are issued provides that the bonds shall be of a certain denomination, the officers or body authorized to issue the bonds may direct of what denomination they shall be issued.

Where bonds are authorized to be issued between certain denominations, it has been held that bonds of any denomination within the limits are good, without regard to the denomination mentioned in the proposal.⁴ And

¹ *Thompson v. Lee Co.*, 3 Wall. 338.

² *Elizabeth v. Force*, 29 N. J. Eq. 587; *Birdsall v. Russel*, 29 N. Y. 220.

³ *Davies Co. v. Dickson*, 107 U. S. 607; *McPherson v. Foster*, 43 Iowa, 48.

In a case where the order of the Commissioners' Court directed the issue of 86 bonds to be dated within eleven days from the date of the

order and delivered when certain work was performed, the bonds in suit were issued ten months after the date of the order and were numbered 90 to 96. The court held that the purchaser was put on inquiry to ascertain whether the bonds were issued in excess of the order. The court held the bonds void. *Ball v. Presido Co.*, 29 S. W. R. 1042.

⁴ *Green Co. v. Daniel*, 102 U. S.

where the amount of the issue could not be conveniently divided into the denomination named in the enabling act, and were issued in other denominations, the bonds were held valid.¹

In *E. M. Darby & Co. v. City of Modesta*, 38 Pac. R. 900, it was held that where a statute required that the ordinance calling a special election to submit the proposition of the issue of the bonds, it should state the number and character of the bonds to be issued.

And the ordinance stated that the number to be issued was fifty bonds of the denomination of \$500. By a subsequent ordinance providing for the issue of the bonds the number was changed to forty bonds of \$500 each and twenty bonds of \$250 each.

The court held the change did not affect the validity of the bonds and said :

“The amount of the bonds or the indebtedness to be incurred for the specific purpose was not changed. Those directions which are not of the *essence* of the thing to be done, and by the failure to obey which the rights of those interested will not be prejudiced, are not to be regarded as mandatory. Suth. St. Const. sec. 447. The change did not affect the validity of the bonds, and as no greater burden is imposed upon the taxpayers the appellant cannot complain.”

§ 100. **Date.**—The statute under which the bonds are issued usually fixes the time within which the bonds are to be paid and the time is counted from the date of the bond.

The bonds need not bear date of the date of the ordinance providing for their issue ; any date after the passage of the ordinance will, unless restricted, suffice.²

Usually the ordinance or resolution designates the date the bonds are to bear.

Sometimes the bonds or other municipal securities, from want of proper caution, are made to bear date on Sunday. They are not for that reason void unless they are also

87: *Milan Taxpayers v. Tennessee* 1 Turner v. Woodson Co., 27 Kan. R. R. Co., 11 Wheat. 329. 314.

2 Flagg v. Elmira, 33 Mo. 440.

delivered on Sunday,¹ as they take effect only from time of delivery, and until delivered they are not issued. It is no objection that they bear interest from a Sunday,—their date.² And if they are delivered on Sunday the payee may recover upon the original consideration, although the bonds themselves are void.³

When the bonds bear date of a Sunday, parol evidence is admissible to show that they were not in fact delivered upon Sunday.⁴

§ 101. **Interest.**—The coupons attached to the bonds represent the interest, therefore no interest can be recovered on the bond until it matures. After the bond matures and it is not paid, the bond itself draws interest from date of maturity, and the rate of interest contained in the bond is the rate to be calculated after maturity of the bond and the coupon,⁵ although the courts have refused to follow this general rule when the rate provided in the bond or instrument was extortionate.⁶

When the principal and interest of the bond is to be paid in a State other than that where it is executed, the parties may contract for the rate in either State;⁷ but the general rule is that the rate where payment is to be made governs unless otherwise provided.

If the coupons are not paid when due they draw interest from date of maturity, and generally no demand is necessary in order to bring suit; but it is a good defence to a claim for interest on either a coupon or bond that no demand of payment was made and that the corporation had funds on hand to meet the obligation.⁸

Some of the States hold that a demand and refusal is

¹ *Conrad v. Kinzi*, 105 Ind. 281.

⁷ *Cromwell v. Sac Co.*, 96 U. S.

² *Marshall v. Russel*, 11 N. H. 509.

51; *Daniel on Neg. Inst.*, 923; *Stur-*

³ *Sayre v. Wheeler*, 31 Ia. 412.

divant v. Memphis Nat. Bk., 60

⁴ *Stacy v. Kemp*, 97 Mass. 166; *Fed. Rep.* 736.

King v. Fleming, 72 Ill. 21.

⁸ *North Penn. R. R. v. Adams*, 54

⁵ *Cromwell v. County of Sac*, 96 U. S. 51; *Brannan v. Hursell*, 112 Mass. 63.

Pa. 97; *Koshkonong v. Burton*, 104 U. S. 668; *Friend v. City*, 131 Pa. St. 305.

⁶ *Brewster v. Wakefield*, 22 How. 128.

necessary before interest can be claimed on overdue coupons or bonds, and that the debtor corporation need not seek its creditor.¹

In *Gelpeck v. Dubuque*, 1 Wall. 20, the court said : "Municipal bonds with coupons payable to bearer having by universal usage and consent all the qualities of commercial paper, a party recovering on the coupon is entitled to the amount of them, with interest and exchange at the place where, by their terms, they were made payable."

In the case of *City of Quincy v. Warfield*, 25 Ill. 317, bonds were issued bearing interest at twelve per cent per annum while the statute authorized but eight per cent. The court held the bonds to be valid, but that interest at eight per cent only could be recovered.²

The court said : "All acts performed in excess or beyond the power delegated must be rejected as unwarranted, but if after the rejection of such acts there has been enough done to show a proper execution of the power, the act will be sustained, irrespective of the acts performed beyond the power delegated. In other words, so much of the act done as is within the power granted shall be upheld, whilst all beyond the power shall be rejected as an excess of power."

In *Omaha Nat. Bk. v. Omaha*, 15 Neb. 333, it appeared the city authorities submitted to the electors a proposition for the issue of \$100,000 of bonds for street paving, the bonds to run twenty years and to draw interest at six per cent per annum. The authorities, finding that they could float the bonds at a less rate, issued the bonds bearing interest at five per cent instead of six, and sold them to the plaintiff, which in the present suit sought to rescind the contract and recover the money paid, upon the theory that the bonds were void by reason of the change in the rate. The court held that the change was within the power of the authorities, that it was not in

¹ *People v. Tazewell Co.*, 22 Ill. 147; *Whitaker v. Hartford R. R.*, 8 R. L. 47.

² See also *Byrne v. Luning*, 8 Cal. 189; *Quincy v. Chapman*, 25 Ill. 332.

excess of it, and was for the benefit of the city, and therefore dismissed the suit.¹

Where the ordinance submitted to the voters unnecessarily fixed the rate of interest for the bonds which was approved by the legal voters with the other questions, the municipality will not be restrained, at the suit of a taxpayer, from negotiating the bonds at a higher rate, if such higher rate is necessary in order to sell them.²

It is no objection to bonds that the coupons be for interest semi-annually, though the proposition to the voters was for interest payable annually,³ although in one case the issue of the bonds was *restrained* because the proposition submitted was for interest payable annually and the bonds provided that it be paid semi-annually.⁴

§ 102. **Time of payment.**—The time when the bond must be paid or when it matures must be stated in order to render it negotiable. It must be at a time certain and not depend on a contingency. When the statute fixes the date of payment it must be strictly followed ;⁵ but if the statute is silent on this point then the time may be such as

¹ In *Board of Commissioners v. Kingman*, 47 Fed. Rep. 119, the court said: "The general doctrine is that where a contract or undertaking which has been entered into by a corporation is simply in excess of its corporate powers, and the same have been fully executed, the defence of *ultra vires* cannot be successfully pleaded in a suit to enforce negotiable securities or other obligations which have issue out of the original transaction. . . . It is ordinarily held between private litigants that the plea of *ultra vires* is not available as a defence. In *Johnson Co. v. Stark*, 24 Ill. 75, the court said: "The doctrine is well recognized that in exercising a power, all acts performed in excess of, or beyond, the power delegated, must be rejected as unwar-

ranted, and if, after their rejection, there has been enough done to show a proper execution of the power, the act will be sustained, irrespective of the acts beyond the power delegated. But, on the contrary, if the acts performed beyond the authority conferred are so inseparably connected with the acts properly performed, that, by their rejection, the power remains unexecuted, then the whole transaction must be rejected as void."

² *Yesler v. City of Seattle*, (Wash.) 25 P. R. 1014; 1 Wash. 308.

³ *Commissioners v. Clark*, 94 U. S. 278; *Wilson v. Neal*, 23 Fed. Rep. 129.

⁴ *Skinner v. Santa Rosa*, (Cal.) 40 Pac. R. 712.

⁵ *McMullen v. Ingraham*, Cir. J., (Mich.) 61 N. W. R. 260.

may be arranged by agreement or selected by the municipality.¹

When the statute fixes the time within which the bonds must be payable, then any time within that designated may be selected as the time the bonds shall mature, but the statutory time cannot be exceeded without rendering the bonds invalid ;² but it has been held that bonds may be made payable in a shorter time than that provided for by statute. In a case in New Jersey,³ the court said :

“ If the contract was in opposition to express legislation, to public policy or to any general principle of law, then such contract must fail ; but its want of coincidence with mere naked formalities or statutory directions not intended to be of the essence of the thing authorized will not have such effect.

“ The circumstances that the bonds were required to be payable in twenty years rather than five, or within any other designated period, could not be matter of substance for anything but an immaterial incident to the act authorized.”⁴

On the other hand, it has been recently held that where a statute authorized the issue of municipal bonds payable in not less than ten years from date, bonds issued thereunder in eleven days less than ten years from date were void even in the hands of a *bona fide* holder.⁵ And

¹ Chicago etc. Co. v. Aurora, 99 Ill. 205. When the statute does not require that the time of payment be submitted to the voters, it is unnecessary to present that question to them. People v. Town of Harp, 67 Ill. 62.

² Potter v. Greenwich, 26 Hun, 326 ; Barnum v. Town of Okolona, 148 U. S. 393.

³ Singer Mfg. Co. v. Elizabeth, 42 N. J. L. 249. See also Township of Red Creek v. Strong, 96 U. S. 271 ; Mott v. U. S. Trust Co., 19 Barb. 569 ; Northwestern Mut Ins. Co. v. Overholt, 4 Dill. 287.

⁴ In Dows v. Town of Elmwood,

34 Fed. Rep. 114, the bonds in suit bore date April 27, 1869, and were delivered on that day, but it was set out on their face that they ran 20 years from July 1, 1869. The statute authorized the issue of bonds, “ not exceeding twenty years from date.”

The court held the bonds valid, holding the difference between April 27, 1869, their date, and July 1, 1869, being only a reasonable time for issuing and delivering the bonds. See also Township of Rock Creek v. Strong, 96 U. S. 271.

⁵ People's Bank v. School Dist., (N. D.) 57 N. W. R. 787. See also

where the proposition submitted to the vote of the taxpayers was for bonds to run for ten years and the vote taken was for bonds to run for twenty years, *mandamus* to compel the issue of the bonds was refused.¹

Where bonds were authorized for thirty years at interest, bonds payable in thirty-five years, but with interest only for thirty, were held valid.² And under authority to issue bonds payable in fifteen years from the date of the act, bonds issued four years after and made payable in eleven years were held valid.³

Bonds payable in twenty-five years after date with a stipulation that "this bond will be redeemed, if desired, twelve years after date," means that they are to run for twenty-five years, and cannot be redeemed until then without the consent of the holder.⁴

In the case of *Lewis v. Potter*, 26 Hun, 331, it appeared that the Commissioners of the town of Greenwich issued bonds which were by the terms thereof due and payable in twenty years, instead of thirty years, after their date, as required by the statute. The court held such bonds void, and that the court could not reform them to conform to the statute.

In *Brownell v. Town of Greenwich*, 51 Hun, 611, the bonds in suit were issued under the same statute for twenty years, but before their delivery a supplement to the statute had been passed which permitted the issue of such bonds for any period less than thirty years. These latter bonds were held valid, because they were not actually issued, although dated before the supplement to said act was a law. The court said: "Although the legal

Barnum v. Town of Okolona, 118 U. S. 393. In *McMullan v. Ingham*, Circuit Judge, (Mich.) 61 N. W. R. 260, the bonds in suit were made payable in fifteen years. Pursuant to a statute which required, "that all loans made by a board of county supervisors shall be made payable in fifteen years," the same statute required that before bonds be issued the proposition be submitted to the voters. This was done and the prop-

osition as carried provided for an issue extending over a period of thirty years. The bonds in suit were therefore declared void.

¹ *Cairo etc. v. Sparta*, 77 Ill. 505.

² *Rock Creek v. Strong*, 96 U. S. 271.

³ *Gilchrist v. Little Creek*, 1 Dill. 261.

⁴ *Allentown v. Derr*, 115 Pa. St. 439.

presumption is that these bonds were issued at the time they bear date, yet that presumption may be overcome by proof that they were issued at a different date."

Where a statute authorized the issue of bonds by towns and counties to aid railroads, provided that such bonds should not extend beyond ten years, and bonds were issued thereunder payable in eleven and seventeen years, the United States Supreme Court sustained a demurrer to the declaration on such town bonds and coupons, and held the bonds to be invalid.¹

Where the municipal bonds are void because payable at a different time than that allowed by law, but the bonds are issued and purchased in good faith, and the municipality had a legal right to issue such bonds, except as to time of payment, the law will imply a promise by the municipality to repay the purchaser the amount paid for such bonds at the time and according to the terms which should originally have been inserted in the bonds.²

§ 103. **Same.**—When the act under which the bonds are issued is silent as to the time of their payment, but there is some general act which provides that all bonds shall be payable within a certain time, or that the loans of the class of municipalities, of which the municipality issuing the bonds is a part, shall be payable within a certain period, the bonds must be payable within the time regulated by the general act.³

Where the bond provides that it shall be payable at

¹ *Barnum v. Okolona*, 148 U. S. 393. See also *Woodruff v. Okolona*, 57 Miss. 806.

The court in the former case said :

"The Legislature of Mississippi, in authorizing the town of Okolona to subscribe for stock in a railroad company and to pay for the same by an issue of bonds, prescribed that such bonds should not extend beyond ten years from the date of issue, such limitation must be regarded as in the nature of a restriction on the power to issue the bonds." In this case the statute authorized counties in one section

of the statute, and towns in a subsequent one, to issue the bonds, and the limitation as to time was found in the section providing for the issue of the county bonds. The court held the limitation also applied to the town bonds, because in authorizing the towns to issue such bonds in the subsequent section, it provided they should be issued "in the same manner and with like effect."

² *Hoag v. Town of Greenwich*, 133 N. Y. 152.

³ *Board of Sup. v. Simmons*, (Mich.) 62 N. W. R. 292.

the pleasure of the municipality issuing it, before the time fixed in the bonds, such bonds are still held to be negotiable. Because they are payable at a time which must certainly arrive, the holder could not exact payment before the day fixed in the bonds, the debtor incurred no legal liability for non-payment before that day passed.¹

Where coupon bonds are redeemable at the option of the corporation, before the date of maturity, the corporation cannot stipulate that all matured coupons must accompany the bonds and be presented with them for payment, unless such condition be a part of the bonds, and a deposit to pay such bonds subject to such an unauthorized condition will not stop the running of the interest.²

§ 101. **How executed—Officers to sign.**—They are signed by the mayor or other chief executive officer of the municipality, or president or chairman of the board or commission, and are usually countersigned or attested by some other officer or officers, usually the clerk and treasurer.

The statute pursuant to which they are issued, or the charter of the corporation, or the ordinance or resolution directing their issue, must designate the officer or officers who are to execute the bonds.

The officers who execute the bonds must be expressly authorized so to do; they cannot act without authority, and this authority must be a matter of public record.³

It has been held that it was competent for a county judge to leave his State (Iowa) and go to New York and there procure a new seal and execute and deliver the bonds, and this although the statute of his State provided that, in case of his absence, the county clerk should take his place.⁴

Where the officers to sign are not designated by statute they must be officers of the municipal corporation.⁵

¹ *Ackley School Dist. v. Hall*, 143 U. S. 135.

² *Bailey v. County of Buchanan*, 54 N. Y. Super. Ct. 237.

³ *Brown v. Bon Homme Co.*, 46 N. W. R. 173; *Clairborne Co. v. Brooke*, 111 U. S. 400; *Little Rock*

v. Bank, 3 Eng. (Ark.) 277. See §§ 44 *et seq.*

⁴ *Lynde v. Winnebago Co.*, 16 Wall. 6.

⁵ *Lane v. Embden*, 72 Me. 354; *Middleton v. Mulica*, 112 U. S. 433.

When the statute or ordinance or resolution prescribes the officer who shall execute them, it must be the officer who is actually holding office at the time of signing,¹ but he will be presumed to have signed during his term of office.² If the statute requires that a particular officer shall execute the bonds, they are not valid without his signature, and purchasers must take the risk of the genuineness of the signatures and character of the officials.³

When the law requires that the auditor of the State, or some other official besides the municipal officers, shall sign the bonds or register them, such bonds, if not so signed or registered, are not valid obligations of the municipality.⁴

Bonds executed by a mayor after the date of the bonds, but occupying that office at the time of their negotiation and delivery, is a proper execution.⁵ And where the bonds were signed by an officer whose term had expired, there being no fraud intended, it was held that the town, having put the bonds in circulation, was estopped to deny their validity.⁶

¹ Coler v. Cleburne, 131 U. S. 162.

² School Dist. v. Xenia Bank, 19 Neb. 89.

³ Bissell v. Spring Valley, 101 U. S. 163; Merchants' Bank v. Bergen, 115 U. S. 384.

⁴ Anthony v. Jasper Co., 101 U. S. 693.

⁵ Yesler v. City of Washington, 25 Pac. Rep. 1014; 1 Wash. 308.

⁶ Weyanwega v. Ayling, 99 U. S. 118.

In the case of Coler v. Cleburne, 131 U. S. 162, where it appeared that bonds were issued by the City of Cleburne under a statute which required that the bonds should be signed by the mayor, and forwarded by him to the State comptroller for registration, the bonds were issued pursuant to a valid ordinance and bore date January 1st, 1884, which ordinance required that the bonds be signed by the

mayor and the city secretary. The term of the mayor in office January 1st, 1884 (the date of the bonds), expired in April following. His name was Hodge.

After April, the city had a new mayor, whose name was Odell.

The bonds were not signed until July, 1884, and were then signed by the former mayor, Hodge, who affixed after his signature the word "Mayor," and the city secretary who remained in office.

The coupons were likewise signed. Hodge signed the bonds pursuant to a resolution of the city council adopted July 3d, 1884.

The suit was brought by a *bona fide* holder, without notice, upon some of the coupons cut from the bonds, and the city interposed the plea of *non est factum*.

The plaintiff contended that the city was estopped to set up this de-

The acts of commissioners designated in the enabling statute to execute the bonds are the acts of the municipal corporations.¹

fence because the ordinance authorized the bonds to be dated January 1st, 1884, and signed by the then mayor, and that they were so signed, and that upon their face they were apparently regular and signed by the person who was mayor at their date, and further that the bonds had been forwarded by him to the State comptroller and registered in the latter's office as required by the statute. The bonds were held void.

As this case is of importance and is distinguished from some other cases apparently in conflict with it, the opinion of the court is given almost in full.

Mr. J. Blatchford, who delivered the opinion of the court, said :

" It is contended for the plaintiff, that as Hodge, who signed the bonds as mayor, was the mayor on January 1, 1884, the date of the bonds, and the plaintiff was an innocent purchaser of them for value, he was not bound to look beyond the bonds themselves, and the enabling acts authorizing their issue, and that, if there was lawful authority to issue them and the city appeared to have acted upon that authority, he was not obliged to inquire further, no matter what irregularity characterized the acts of the officers who issued them on behalf of the city ; that the face of the bonds referred him to article 120 of the statutes, and to the ordinance of September 13, 1883 ; that an examination of the statute and the ordinance would show author- ity to issue the bonds ; that the

records of the city would show that the persons who signed the bonds were the mayor and the secretary of the city on the 1st of January, 1884, the date of the bonds ; that the indorsement on each bond would show that it had been registered by the comptroller ; and that he had a right to presume that the bonds had been forwarded to the comptroller by the mayor, as provided by the statute, or otherwise the comptroller would not have registered them.

" But we have always held that even *bona fide* purchasers of municipal bonds must take the risk of the official character of those who execute them. An examination of the records of the city in regard to the issuing of the bonds would have disclosed the fact that the bonds had not been signed and issued under the ordinance of September 13, 1883, until July 3, 1884, that W. N. Hodge was not mayor on that day ; and that the person who then signed the bonds as mayor was a private citizen.

" In *Anthony v. County of Jasper*, 101 U. S. 693, municipal bonds were signed and issued in October, 1872, on a subscription made in March, 1872, to the stock of a railroad company, and bore date the day of the subscription. The presiding justice who signed the bonds did not become such until October, 1872. Thus the person who was in office when the bonds were actually signed, signed them, but they were antedated to a day when he was not in office. In the present case,

¹ *Brownell v. Town of Greenwich*, 114 N. Y. 518.

It is held that the act of countersigning is but a ministerial act, and that an officer whose duty it is to so sign

the bonds were not signed by an officer who was in office when they were signed, but by a person who was in office on the antedated day on which they bore date. In the Jasper County case there was a false date inserted in the bonds in order to avoid the effect of a registration act which took effect between the antedated date and the actual date of signing. In the present case, there was a false signature. But the principle declared in the Jasper County case is equally applicable to the present case. It was there said by Chief Justice Waite, delivering the judgment of the court (p. 698): 'The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted; and he cannot bind his principal under power that have been taken away, by simply antedating his contracts. Under such circumstances, a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. After the power of an agent of a private person has been revoked, he cannot bind his principal by simply dating back what he does. A retiring partner, after due notice of dissolution, cannot charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder by giving it a date within the period of the ex-

istence of the partnership. Antedating, under such circumstances, partakes of the character of a forgery, and is always open to inquiry no matter who relies on it. The question is one of the authority of him who attempts to bind another. Every person who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. In *Bayley v. Taber*, 5 Mass. 286, it was held that when a statute provided that promissory notes of a certain kind, made or issued after a certain day, should be utterly void, evidence was admissible on behalf of the makers to prove that the notes were issued after that day, although they bore previous date. . . . Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper they buy. This includes, not only the genuineness of the signature itself, but the official character of him who makes it.'

'This ruling has been since followed. In *Bissell v. Spring Valley Township*, 110 U. S. 162, where bonds were issued by a township in payment of a subscription to railway stock, under a statute which made the signature of a particular officer essential, it was held that without the signature of that officer they were not the bonds of the township, and that the municipality was not estopped from disputing their validity by reason of recitals in the bond, setting forth the provisions of the statute, and a compliance with them. The same prin-

has no authority to determine whether the proper steps have been taken to authorize the issuance of the bonds,¹ and that the omission of such officer to countersign is a mere defect of execution which a court of equity will, in the absence of a remedy at law, ordinarily supply, and that an injunction restraining the collection of taxes for such bonds will not be allowed,² but where the statute makes the signature of an officer essential to the validity of the bond, he must sign it in order to render it a valid obligation, although he has no discretion to withhold it.³

Where the statute provided that, after an affirmative vote by the taxpayers, the bonds should be signed by the town magistrate, treasurer and commissioners, it was held

ciple is recognized in *Northern Bank v. Porter Township*, 110 U. S. 608, 618, 619, and *Merchants' Bank v. Bergen County*, 115 U. S. 384, 390.

The case of *Weyauwega v. Ayling*, 99 U. S. 112, is cited for the plaintiff. In that case the bonds of a town bore date June 1, and were signed by A as chairman of the board of supervisors, and by B, as town clerk, and were delivered by A to a railroad company. When sued on the coupons by a *bona fide* purchaser of the bonds for value before maturity, the town pleaded that the bonds were not in fact signed by B until July 13, at which date he had ceased to be town clerk, and his successor was in office. It was held, Chief Justice Waite delivering the opinion of the court, that the town was estopped from denying the date of the bonds, because, in the absence of evidence to the contrary, it must be assumed that the bonds were delivered to the company by A with the assent of the then town clerk.

In *Anthony v. County of Jasper*, the court distinguished that case from *Weyauwega v. Ayling*,

and said that in the latter case it held that 'the town was estopped from proving that the bonds were actually signed by a former clerk after he went out of office, because the clerk in office adopted the signature as his own when he united with the chairman in delivering the bonds to the railroad company,' while in the former case the bonds were not complete in form when they were issued, and it was only by a false date that they were apparently so. In the present case, it appears affirmatively by the bill of exceptions that the person who was mayor of the city at the time the bonds were signed took no part in signing, delivering or issuing them; that they were not complete in form when they were issued, because they were not signed by the then mayor; and that it was only by a false date that they were then apparently complete in form. Hence, the present case is not like *Weyauwega v. Ayling*, but is like *Anthony v. County of Jasper*."

¹ *Houston v. People*, 55 Ill. 398.

² *Melvin v. Lisenby*, 72 Ill. 63.

³ *Bissell v. Spring Valley*, 110 U. S. 162.

that, although the bonds were only signed by the treasurer and magistrate, they were valid, and that the statute was directory in respect to the execution.¹

§ 105. **Signing—What sufficient.**—In some cases it has been held to be a sufficient signing where a lithograph or printed *fac simile* signature was used, it having been adopted by the maker.² An invalid signature cannot be made valid by ante-dating or post-dating, so as to make it appear that when they were signed the officer signing was then in office, and a false date of this kind for such purpose is equivalent to a forgery and will render the bonds invalid even in the hands of a *bona fide* holder.³

The bonds must be issued strictly in conformity with the enabling statute, and no material deviation from it will be allowed.⁴ Where the body is authorized to sign the bonds, it is held, unless the statute requires otherwise, a signing by the majority of the body is sufficient.⁵

When the commissioners who are authorized to issue bonds constitute by statute a board, the bonds should be signed by the presiding officer of that board, or such other officer or officers as the board designate and in such cases they should not be signed by the individual member of the board.⁶

Where the name of the officer who was authorized to sign was written by another person at his own request, and afterwards treated as his own, the bonds so executed have been held valid, in the hands of *bona fide* holders.⁷

Where the authority to issue exists, the signing of the bonds in blank and depositing them with a third party to hold until certain conditions are complied with, and

¹ In Bank v. Statesville, 84 N. C. 169.

² Lyde v. County, 16 Wall. 6; Neely v. Yorkville, 10 S. C. 141.

³ Anthony v. Jasper Co., 101 U. S. 693.

⁴ Coler v. Cleburne, 131 U. S. 162.

⁵ First Nat. Bank v. Arlington, 16 Blatchf. (U. S.) 57; Gibbs v. School District, (Mich.) 50 N. W. R. 294.

⁶ Breckenridge Co. v. McCracken, 61 Fed. Rep. 191; Davenport v. County of Dodge, 105 U. S. 237.

⁷ School Dist. v. Xenia Bank, 19 Neb. 89; Montgomery v. Tp. of St. Mary's, 43 Fed. Rep. 362; Just v. Wise Tp., 42 Mich. 575; Town of Weyauwega v. Ayling, 99 U. S. 112.

afterwards filling up the blank is a mere irregularity which cannot prejudice the rights of an innocent holder.¹

§ 106. *Sealing.*—It is essential that the bond should have the corporate seal affixed, but it has been held in many cases that although unsealed it is a valid obligation, provided it be in other respects proper in form and execution, and that the requirement as to seals was directory and formal, that their omission was immaterial.² In all these cases it will be found upon inspection of the statutes under which the bonds were issued that, in addition to the authority to issue the bonds, the corporation had the power to contract the debt, or otherwise pledge the faith of the corporation,³ or the statute did not contain any express provision that the instruments be under seal.⁴

And where the bonds were not under seal they have been declared void.⁵ It will therefore be observed that,

¹ *Nyantie Sav. Bank v. Douglass*, 5 Ill. App. 579.

² *Town of Solon v. Williamsburgh Sav. Bk.*, 114 N. Y. 125, and cases cited; *People v. Mead*, 21 N. Y. 121; *Augusta v. Augusta Bank*, 55 Maine, 156; *Connecticut Life Ins. Co. v. Cleveland R. R.*, 41 Barb. 22; *Jones on Railroad Securities*, § 189; *Bernards Township v. Stubbins*, 109 U. S. 311.

³ In *San Antonio v. McMahon*, 96 U. S. 312, 315, where the city had authority to subscribe to a railroad company and "may issue bonds bearing interest or otherwise pledge the faith of the city," and it issued bonds which were not sealed, the court said of them: "The principal securities delivered to the company were not *bonds*, because they were unsealed," but held them to be instruments pledging the faith of the city within the scope of the authority.

⁴ In *People v. Mead*, 21 N. Y. 125, the bonds in suit were not under seal, and objection was made

to them for that reason. The court said: "But if the town had a seal it would not have been proper to affix it to these obligations, for the act directs that they shall be executed in another manner, namely, under the official signatures of the supervisors and railroad commissioners, and these instruments were authenticated in that manner."

⁵ "Whatever force there may generally be in the words 'bond' or 'bonds' which were used in the act, is overcome by the explicit directions as to their execution, which has been mentioned."

⁶ In *Avery v. Town of Springport*, the coupons in suit were detached from bonds issued to aid a railroad (pursuant to Laws of New York, 1869, Vol. 1, p. 677). The act directed that the bonds should be under the hands and seals of the commissioners. The bonds were not sealed. The court held the coupons to be void.

The court said: "The coupons are not themselves sealed, nor are

in order to avoid all questions as to the validity of the bonds in this respect, they should be under the seal of the municipality issuing them. It has been held, that where the seals were omitted by inadvertence or misunderstanding the court of equity would afford the relief requisite to the party entitled to the benefit of the instruments, to render them enforceable.¹

It has been held that where a bond recited that it was executed under the hand and seal of the obligor, he was estopped by such recital to show that it was not sealed.²

A scroll will not answer in place of a seal, unless the statute which authorizes the use of a scroll in place of a seal in the execution of sealed instruments includes municipal corporations or officers as well as private persons.³

any of them executed by more than the signature of one commissioner.

"They are therefore subject to all the difficulties that the bonds are liable to. The defect, if it be one, being in the execution, which does not pursue the direction of the statute, neither the plaintiff nor any one else can become possessed of the bonds without knowledge of the absence of seals, and of the requirements of the statute in that regard. This action is on the instruments, and the recovery can only be had on them. The law which authorized bonds to be issued prescribes the form and mode in which they are to be executed. They are to be under the hands and seals of the commissioners. Instruments under their seals and not under their hands, or under their hands and not under their seals, are alike not executed in conformity with the statute, and are alike inoperative to create an obligation against the town."

¹ *Wiser v. Blackley*, 1 John. Chr. (N. Y.) 607; *Bernards Town v. Stebbins*, 109 U. S. 341.

² *Mutual Life Ins. Co. v. Bender*, 124 N. Y. 47.

³ *Town of Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 125.

This was an action against the bank brought by the town to compel the bank to surrender the bonds because they were not sealed by the commissioners when they issued them, as required by statute. It appeared from the evidence that after their issue, and before the bank purchased the bonds, some unknown person had affixed seals to them, whether a stranger or one of the prior holders, could not be ascertained. The Court of Appeals of New York, in refusing to compel their surrender, said: "If placed there by some one having no interest in the bonds and without any authority, consent or complicity of any person having any interest, the seals would not be treated as effecting any alteration of the bonds. . . . If, therefore, this was done by a stranger, in the sense of the term applicable in such case, the alteration produced by it would not be effectual to im-

The presence of a seal which purports to be the corporate seal, on a bond which recites that it has the corporate seal affixed and is confirmed by the signatures of the officers, is regarded as *prima facie* the corporate seal of the corporation, but such recital and seal is insufficient to prove that the seal was lawfully affixed and that the corporation is bound by the bond. Proof of authority to execute the bond must be also adduced.¹ Usually the seal of a municipal corporation must be proved by proper evidence; the presence of the seal does not prove itself.

§ 107. **Coupons.**—The coupons attached to the bonds are separate promises to pay the interest on the bond to the holder when due at the place appointed in the coupons or bond. They usually each designate the time and place of payment.

They are given as a convenient mode of obtaining payment of interest as it becomes due on the bond, and they are substantially but copies of the stipulation in the body of the bond in respect to the interest, and are so attached

pair the right before existing to enforce the bonds, but, inasmuch as they passed through the hands of other owners before they reached the defendants, it is contended that the finding that it was done by a stranger is not supported, and the presumption arises that the seals were affixed by some party having an interest in having them put on, and, therefore, explanation is necessary to relieve them from the effect of the alteration. As a general rule, when a material alteration appears to have been made in a written instrument after its execution, evidence is necessary to explain it, and the burden of proof rests upon the party seeking to enforce it to do so to support a recovery upon it. . . . The plaintiff's counsel seeks to apply that rule in respect to the burden of proof to this case, and insists that the defendant must bear it. While the

burden is with a party seeking to enforce the contract, to relieve it from the effect of any material alteration made in it after its inception, that rule is not necessarily applicable to a defendant in an action brought to have a security held by him cancelled upon that ground, when it appears that such defendant is in no sense chargeable with *mala fides* in that respect. Our attention is called to no authority going to that extent. And the proposition does not seem to commend itself to a court of equity which is supposed, within recognized bounds, to exercise discretionary powers in such cases."

The court also held a court of equity would afford the necessary relief by directing that the seals be affixed to the bonds.

¹ *Fidelity etc. Co. v. Shenandoah etc. Co.*, 32 W. Va. 244; *Memphis v. Adams*, 9 Heisk (Tenn.) 553.

to the bond that they may be cut off as a matter of convenience in collecting the interest, or to enable the holder of the bond to realize the interest due, or to become due, by negotiating the coupons, or to allow him to collect the interest on the bond without the necessity of presenting the bond every time an instalment of interest becomes due.¹ When the coupon is detached it may be negotiated as money, and in the hands of a *bona fide* holder before maturity is absolutely his, although the same was obtained by theft or was lost by the owner. So long as a person obtains them before maturity for value and without knowledge of any defects in the title he is protected in his possession of them and entitled to recover their value.

It is not necessary that legislative authority to issue the coupons be given. The relation between the bond and the coupon is so intimate that authority to issue bonds payable with interest implies the right to issue the coupons.²

The coupons need not be presented for payment on the day of maturity, except to hold an endorser, if there be one; or within a reasonable time after maturity to hold a guarantor.

The holder of the bond cannot recover the interest thereon unless he has possession of and produces the coupon, but the holder of the coupons may recover the money due on the latter and need not produce or own the bond, except in those cases where the coupon does not contain any promise to pay and the promise is to be found in the bond itself. In such cases it has been held that the bond must be produced in order to show the intent and meaning of the coupon, and they are to be construed together.³

Although coupons are usually paid as they fall due, those past due are not entitled to be first paid, when they are to be paid out of mortgaged property, but in

¹ City of Kenosha v. Lamson, 9 Wall. 482. ³ City of Kenosha v. Lamson, 9 Wall. 483; Metcure v. Township

² Board of Ed. of Atchison v. De Oxford, 92 U. S. 429.

Kay, 148 U. S. 591.

such cases if the proceeds are insufficient to pay all the coupons, as well as the bonds themselves, the bonds and all the coupons are entitled to a *pro rata* distribution, priority attaching to neither bonds nor coupons.¹

When coupons are severed they become separate negotiable instruments:² they are not entitled to days of grace like bills and notes, except in New York, where it has been held that they are entitled to the regular days of grace: but since days of grace on bills and notes have been abolished in that State, it is presumed coupons are also no longer entitled to grace.

§ 108. **Form of coupon—Negotiability.**—The fact that no payee is named in the coupons, or that it contains no words of promise, has been held not to render it invalid and uncollectible,³ although the opposite view has been taken in several cases in New York.⁴ It has been held that in whatever words the coupons are expressed they are negotiable, provided they indicate by whom they are due, the amount, and when payable.⁵

They are in various forms, usually in that of an express promise to pay to the bearer the interest due, at a fixed time and place, but although the coupons themselves contain no promise of payment this does not relieve the payer from liability, if the bonds from which they are detached contain this promise.⁶ Again, they are in the form of a check or draft upon a banking house in favor of the bearer; they are then rather a check than a bill of exchange.⁷ Again, they are in the form of a bill or draft but designate no drawer, thus: "Pay to the bearer twenty dollars on the first day of May, 1880, interest to that date," and signed by the proper officers. Whatever be the form of the coupon the intent and scope of the instrument is the same. It furnishes the holder with evidence of the

¹ Sewall v. Brainerd, 33 Vt. 364; ² Woods v. Lawrence, 1 Black. Ketchum v. Duncan, 96 U. S. 659. (U. S. R.) 360. Daniel on Neg.

³ Mercer Co. v. Hackett, 1 Wall. Inst. 1493.

s3.

⁴ Mayor etc. of Nashville v. Potomac Ins. Co., 2 Baxt. 296.

Black, 360.

⁵ Arents v. Commonwealth, 18

⁶ Evertson v. Nat. Bank, 66 N. Y. Gratt. 750.

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amount of interest due upon the bonds at a certain time and place, and his right to receive the same.

The coupons are usually signed by the mayor or other executive officer of the municipality, or the chairman or president of the board or commission, and sometimes by the other officers who joined in the execution of the bonds; but unless the statute requires the signature or signatures of such other officer or officers to the coupons they need not be signed by them.¹

The coupons are usually signed by a printed fac-simile of the officer's signatures upon the bonds, and this is a sufficient signature, although not authorized by statute.²

§ 109. **Bond and coupon construed together—Receivable for taxes.**—The connection between the bond and the coupon, when negotiable, is such that although the coupon, is an independent instrument, yet the terms of the bond, in case of a conflict between them, govern the contract for interest, and in case of an omission of a promise to pay supply that omission, and although separated from the bond it still remains a part of it and is protected by and subject to the covenants which it contains.³ Where the coupons refer to the bond, a *bona fide* purchaser is chargeable with notice of all the bond contains.⁴

When the statute authorizes the municipal corporation to agree in the bond, or the coupon, that the coupons shall be received for taxes, and this provision is inserted, it adds increased value to the bond because it insures the payment of interest above all other claims, as the holder can use the same in payment of his own taxes or sell the same to others who may so use them. No subsequent act can be passed which will impair this contract.⁵ This provision, however, cannot be inserted unless

¹ Thayer v. Montgomery Co., 3 Dillon C. C. 389.

² Pennington v. Boehr, 48 Cal. 565; McKee v. Vernon Co., 3 Dill. 210; Lynde v. County, 16 Wall. 6.

³ State v. Spartenburg R. R., 8 S. C. 129; Kenosha v. Lamson, 9 Wall. 483.

⁴ McClure v. Town of Oford, 94 U. S. 429.

⁵ Antonio v. Wright, 22 Gratt. 833; Clark v. Tyler, 30 Gratt. 137; Hartman v. Greenhow, 102 U. S. 672; Virginia Coupon Cases, 114 U. S. 270.

the statute providing for the issue of bonds authorized it, because, if a municipal corporation, without authority, entered into such a contract it would be void as to such provision for want of power.

§ 110. Copies of bonds and ordinances.—

Form of bonds in *Chaffee Co. v. Potter*, 142 U. S. 355.

“ No. §1000.

“ United States of America, County of Chaffee,
State of Colorado.

“ FUNDING BONDS.

“(Series A.)

“ The County of Chaffee, in the State of Colorado, acknowledges itself indebted, and promises to pay to or bearer, one thousand dollars, lawful money of the United States, for value received, redeemable at the pleasure of said county after ten years, and absolutely due and payable twenty years from the date hereof, at the office of the treasurer of said county, in the town of Buena Vista, with interest thereon at the rate of eight per cent per annum, payable semi-annually on the first day of March and the first day of September in each year, at the office of the county treasurer aforesaid, or at the banking house of Kountze Brothers, in the city of New York, at the option of the holder, upon the presentation and surrender of the annexed coupons as they severally become due.

“ This bond is issued by the board of county commissioners of said county of Chaffee, in exchange at par for valid floating indebtedness of the said county, outstanding prior to August 31, 1882, under and by virtue of, and in full conformity with, the provisions of an act of the General Assembly of the State of Colorado, entitled ‘An act to enable the several counties of the State to fund their floating indebtedness,’ approved February 21, 1881, and it is hereby certified that all the requirements of law have been fully complied with by the proper officers in the issuing this bond.

"It is further certified that the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado, and that this issue of bonds has been authorized by a vote of a majority of the duly qualified electors of the said county of Chaffee, voting on the question at a general election duly held in said county, on the seventh day of November, A. D. 1882.

"The bonds of this issue are comprised in three series, designated 'A,' and 'B,' and 'C,' respectively; the bonds of series 'A' being for the sum of one thousand dollars each, those of series 'B' for the sum of five hundred dollars each, and those of series 'C' for the sum of one hundred dollars each. This bond is one of series 'A.'

The faith and credit of the county of Chaffee are hereby pledged for the punctual payment of the principal and interest of this bond.

"In testimony whereof the board of county commissioners of the said county of Chaffee have caused this bond to be signed by their chairman, countersigned by the county treasurer, and attested by the county clerk, under the seal of the county, this first day of December, A. D. 1882.

"

" *Chairman of Board of County Commissioners.*

"Attest:

" *County Clerk.*

[COUNTY SEAL.]

(Countersigned.) ".....

" *County Treasurer.*"

"§

(COUPON.)

"§

"The county of Chaffee in the State of Colorado will pay the bearer dollars at the office of the county treasurer, in the town of Buena Vista, or at the Banking House of Kountze Brothers, in the city of New York, on the first day of, being six months' interest on funding bond.

".....

"No. Series

County Treasurer."

Form in *Brenham v. German American Bank*, 142
U. S. 173.

“ UNITED STATES OF AMERICA.

“ STATE OF TEXAS.

CITY OF BRENHAM.

“ CITY OF BRENHAM BONDS.

“ No.

\$100.

BONDS FOR GENERAL PURPOSES, \$15,000.

“ Twenty years after date, for value received, the city of Brenham promises to pay to bearer one hundred dollars, with interest at the rate of ten per centum per annum from date, payable semi-annually, on the first days of September and March of each year, upon presentation of the proper coupon hereto annexed, both principal and interest payable at the office of the treasurer of the city of Brenham. This bond is redeemable after the expiration of ten years from date hereof.

“ This bond is authorized by an ordinance of the city of Brenham, approved June 7, A. D. 1879.

“ In witness whereof the mayor and secretary of the city of Brenham hereunto set their hands
[L. S.] and affix the seal of the city of Brenham,
this 31st day of July, A. D. 1879.

“ M. P. KERR,

“ Mayor.

“ C. H. CARLISLE,

“ *City Secretary.*”

“ UNITED STATES OF AMERICA.¹

“ STATE OF MICHIGAN (Michigan coat of arms).

“ VILLAGE OF HOWELL.

“ IMPROVEMENT BOND.

“ Know all men by these presents, that the village of Howell, in the State of Michigan, acknowledges to owe and promises to pay to J. M. Ashley, Jr., or bearer, the sum of one thousand dollars, lawful money of the United

¹ *Risley v. Village of Howell*, 64 Fed. Rep. 453.

States of America, on the first day of in the year of our Lord one thousand eight hundred and, at the Fourth National Bank in the city of New York, with interest at the rate of six per cent per annum, payable semi-annually on the first days of December and June in each year, on the surrender of the annexed coupons as they severally become due.

“This bond is issued under and by virtue of a special act of the State of Michigan, entitled ‘An act to authorize the village of Howell to raise money to make public improvement in the village of Howell, being 248 of the local act of 1885, of the Legislature of the State of Michigan.’ Approved February 25th, 1885, and also under an ordinance of the village of Howell passed August 12th, 1885.

“In testimony whereof the said village of Howell has caused these presents to be signed by the president and recorder of said village and to be sealed with the seal of said village this twelfth day of August, A. D. 1885.

[SEAL.]

(Signed)

“JAY CARSON,

“*President.*

“GEO. H. CHAPEL,

“*Recorder.*”

ORDINANCES.

An ordinance to provide for the construction of water works in the city of Cleburne, to provide for issuing bonds, and to levy a tax to pay interest and create a sinking fund.¹

“Whereas the city council of the city of Cleburne deem it absolutely necessary that some steps should be taken by the city of Cleburne to protect the property of the city and citizens against fire ; and whereas it is further manifest that the establishment of an efficient system of water works is the most economical protection against fires ; and whereas the Texas Water and Gas Company, a corporation, having its chief domicil in the city of Tyler, Smith County, Texas, has made a proposition, with plans and specifications to construct a complete sys-

¹ Coler v. Cleburne, 131 U. S. 162.

tem of water works in the city of Cleburne, and for the city of Cleburne (as per plans and specifications now on file in the office of city secretary), for fifty-one bonds of the city of Cleburne for one thousand dollars each, with interest at seven per cent per annum, with coupons attached for interest, payable semi-annually; and whereas the city council of the city of Cleburne has accepted said proposition of said Texas Water and Gas Company; now therefore—

“Be it ordained by the city council of the city of Cleburne, that the mayor and city secretary are hereby authorized and fully empowered to execute, sign and deliver for and in behalf of the city of Cleburne, a contract with the Texas Water and Gas Company, a corporation under the laws of Texas, for the construction of a complete system of water works within the corporate limits of the city of Cleburne, according to the plans and specifications submitted by the Texas Water and Gas Company, through M. T. Brown, vice-president and general manager of said corporation; and it is further ordained, that the mayor is forthwith required to have lithographed fifty-one bonds for one thousand dollars each, due twenty years after date, and redeemable at the option of the city at any time after ten years, with forty coupons attached to each, for thirty-five dollars each, payable in the city of New York or in the city of Austin, Texas, the said coupons to fall due the first day of July, 1884, and the first day of January, 1885, and on each subsequent first day of July and first day of January for each and every year up to and including the first day of July, 1905, and, after said bonds are lithographed, the same to be executed, signed and delivered to the said Texas Water and Gas Company, upon the said company's complying with their contract, as therein provided.

“And it is further ordained by the city council aforesaid, that all the revenues realized from operation of water works aforesaid, over and above the expenditures in operating the same, be, and the same is, hereby appropriated and constituted a fund to pay the interest and create

a sinking fund for the final redemption of said bonds as before provided.

“And it is further ordained by the city council aforesaid, that the following tax shall be annually levied and collected, and the same is hereby appropriated, to pay the interest on water-works bonds hereinbefore authorized to be issued, one-fourth of one per cent on each one hundred dollars’ worth of property, and that this provision shall remain and be in force until the said water-works bonds are fully paid and satisfied, provided nothing herein shall prevent the city from remitting the tax or any part thereof herein provided for, in the event the net revenue shall realize a fund sufficient to pay interest and create ten per cent sinking fund on said water-works bonds.

“And it is further ordained that this ordinance take effect from and after its passage.

“And it is further ordained by the city council aforesaid, that to the above there shall be levied and collected one-tenth of one per cent, under and by virtue of the power of the city to levy and collect an annual tax to defray the current expenses of its local government, and the same is hereby set apart and appropriated to the payment of the interest and the sinking fund of the bonds herein provided for.

“Provided, that this section of this ordinance shall be inoperative for such year or years as it may be found that the tax and revenue heretofore provided for and set apart shall be sufficient to pay the interest and sinking fund as provided.

“Passed September 13th, 1883.

“Approved September 13th, 1883.

(Signed)

“W. N. HODGE,

“*Mayor.*

“Attest : W. H. GRAVES,

“*Secretary.*”

Form from Brenham v. German-American Bank,

142 U. S. 173.

An ordinance to provide for the issue and sale of fif-

teen thousand dollars in coupon bonds of the city, to borrow money for general purposes.

“Be it ordained by the city council of the city of Brenham :

“Sec. 1. That the mayor be, and is authorized and empowered to have printed coupon bonds of the city of Brenham to the amount of fifteen thousand dollars.

“Sec. 2. Said bonds shall be three (3) of the denomination of one thousand dollars (\$1000), fourteen (14) of the denomination of five hundred dollars (\$500), twenty-five (25) of the denomination of one hundred (\$100), dollars, and fifty of the denomination of fifty (\$50) dollars.

“They shall be made payable to the bearer twenty years after date, at the office of the treasurer of the city of Brenham, with interest from date until paid, at the rate of ten per cent per annum, payable semi-annually, on the first days of September and March, at the office of the treasurer of the city of Brenham, but the city shall have the right to redeem said bonds at any time after five years from date.

“Sec. 3. Said bonds shall be dated and interest begin to run on the first day of A. D. 18 , provided that should any of said bonds be sold at a subsequent date the amount of interest then due shall be endorsed as a credit on the coupons first due.

“Sec. 4. Said bonds shall be signed by the mayor and countersigned by the city clerk, and the seal of the city shall be affixed and they shall be numbered and registered as Series 2, No. , giving the number of the bond issued, commencing with No. 1.

“Sec. 5. Coupons shall be attached to each of said bonds for each semi-annual instalment of interest, which said coupons shall have printed thereto the signature of the mayor and the city clerk, and shall be received for general ad valorem taxes of the city.

“Sec. 6. Said bonds shall be negotiated and sold by the mayor and the finance committee of the city as the same may be required for general purposes, but in no case shall they be sold at a greater discount than five per cent, and

the proceeds thereof shall be placed in the treasury of the city to the credit of the general fund.

“Sec. 7. That there be, and is hereby, appropriated out of the general ad valorem tax of the city one-eighth of one per cent, or so much thereof as may be necessary, on the assessed value of the taxable property of the city, as a special interest and sinking fund, with which to pay the interest on said bonds and liquidate the same, and said fund shall be kept separate from the other funds of the city and shall be used for no other purposes.

“Sec. 8. That this ordinance go into effect and have force from and after its passage.

“Approved, June 17th, 1879.

“M. P. KERR,

“*Mayor.*

“Attest : C. H. CARLISLE,

“*Secretary.*”

CHAPTER IX.

NEGOTIABILITY—BONA FIDE HOLDERS.

SECTION.

- 111—What term “negotiable” means—Bonds, what they must contain to be negotiable.
- 112—Amount and time must be certain — Coupons must contain words of negotiability.
- 113—What the transferor of bonds warrants—That the signatures are genuine, and the paper what it purports to be—What agent warrants.
- 114—What transferor does not warrant—Does not warrant validity.
- 115—Registered bonds, not negotiable—Rights of holders.
- 116—Who are *bona fide* holders—Before maturity.
- 117—*Bona fide* holders after maturity.
- 118—Rights of original holders.

SECTION.

- 119—What may be inquired into between the corporation and such holders.
- 119 *a-Lis pendens* and judgment as notice.
- 120—Presumptions in favor of holders of negotiable paper.
- 121—Over-due coupons as notice.
- 122—Purchaser of negotiable paper not bound to follow proceeds — When they must do so.
- 123—What notice affects *bona fide* holders—Gross negligence not sufficient.
- 124—Defences against a *bona fide* holder—When corporation estopped to set them up.
- 124 *a*—Lost and stolen bonds—When a subsequent holder obtains a good title—What alterations are immaterial.

§ 111. What the term “negotiable” means.—By negotiability is meant the right of a holder of a written instrument for the payment of money to transfer it by either endorsement and delivery, or delivery, so as to vest in the transferee a legal title therein unaffected by equities, and when necessary, to bring suit thereon in his own name to enforce payment. And the very object of making bonds negotiable is that they may pass from hand to hand like money, and the holder thereof may acquire a perfect title thereto.

It is now the settled law, of both the Federal and State courts, that when bonds are expressed in negotiable words,

they are, to all intents and purposes, as negotiable as promissory notes and bills of exchange.¹ In *Pennsylvania* the court in case of *Diamond v. Lawrence Co*, 37 Penn. St. 353, said: "We will not treat these bonds as negotiable; on this ground we stand alone. All the courts, American and English, are against us."

The Supreme Court of that State, however, has since decided that coupon bonds are negotiable.²

They are negotiable when payable to a person named therein or bearer, or simply to bearer, and in such cases pass by delivery.³ And they are also negotiable when payable to a party named or order; then they pass by endorsement and delivery.⁴

And when payable in blank they are held to be intended as negotiable instruments payable to the holder as bearer, and the holder may negotiate them by inserting the name of another in the blank or deliver them in blank.⁵ But a bond payable to a person named and his assignees was held in a case in *Virginia* not to be negotiable.⁶

Although the bonds are now almost always under the seal of the corporation they have, after some vacillation of judicial decisions, become recognized as on an equality with promissory notes and bills of exchange, and like them are governed by the law merchant, and likewise they to be negotiable must have the same characteristics of negotiability.

§ 112. **Amount and time must be certain—Coupons.**—The bonds must be for a sum certain and be payable at a certain time, and not depend either as to amount or time of payment on a contingency. If they do they are not negotiable.⁷

It has been held that where the place of payment and

¹ *Gelpeke v. City of Dubuque*, 1 Wall. 175; *Seybelle v. Nat. Currency Bank*, 54 N. Y. 288; *Daniel on Neg. Inst.*, Vol. 2, p. 514.

² *Mason v. Frick*, 105 Penn. St. 162.

³ *Roberts v. Bolles*, 101 U. S. 119.

⁴ *Wilson Co. v. National Bank*, 103 U. S. 770.

White v. Vermont M. R. R. Co., 21 How. 575; *Brummel v. Enders*, 18 Gratt. 894.

⁶ *Cronin v. Patrick Co.*, 4 Hughes, 524.

⁷ *Jackson v. Vicksburg R. R.*, 2 Woods C. C. 141; *Parsons v. Jackson*, 99 U. S. 434.

the precise amount are uncertain the bond is deprived of its negotiable character.¹ And where a condition appearing upon the face of a bond which is otherwise negotiable affects the liability to pay at all events, such bonds are held not to be negotiable.²

Where the bonds provided that they should be paid at St. Paul, Minn., with New York exchange, it was held that such a provision renders the amount to be paid uncertain, and therefore the instrument as not negotiable, and being non-negotiable, it was open to all defences which existed against the original holder.³

If the coupons contain no negotiable words they are not negotiable if detached from the bonds. Allen, J., in *Evertson v. Nat. Bank*, 66 N. Y. 20, in a suit on coupons containing no words of negotiability, said: "In this, as in other contracts, its negotiability depends upon its terms, and the rule is, with certain exceptions not applicable to this case, that in instruments for the payment of money, if no one be designated as payee, either by name or as bearer, the instrument is not a promissory note. If these warrants are not promissory notes they are not negotiable."⁴

The authority to a municipal corporation to issue bonds includes power to make and issue negotiable bonds with negotiable coupons attached.⁵

The subject of the negotiability of municipal bonds being discussed in other parts of this work, is discontinued here. The reader is referred for a full discussion of the requisites of negotiable instruments to such well-known books on the subject as those of Daniel, Parson, Cavanagh, Randolph, and others.

§ 113. **What the transferrer warrants.**—The transferrer is deemed to warrant by the mere delivery of bonds and other municipal securities that the paper is the in-

¹ *Parsons v. Jackson*, 99 U. S. 28 Fed. Rep. 865. Contrary, *Hastings v. Thomson*, 55 N. W. R. 568.

² Dill, on Mun. Corp., § 522. See, ⁴ See remarks on coupons, §§ 107, also, Daniel on Neg. Inst., Vol. 1, 108.

§ 53. ⁵ *City of Cadillac v. Woonsocket*

³ *Flagg v. School Dist. No. 70*, 58 Inst. for Sav., 58 Fed. Rep. 935, N. W. R. 199; *Heghitt v. Johnson*,

strument it purports to be ;¹ that the signatures of the officers signing the same are genuine ;² and that it is not tainted by usury.³ But in New York the Court of Appeals has held that the transferrer, by the mere delivery of an instrument void for usury, does not impliedly warrant its validity, that in addition to delivery he must have known that it was tainted by usury ;⁴ but most of the law-writers and many of the courts of other States hold the contrary view.⁵

Where one sells negotiable paper as an agent he must disclose not only the fact of his agency but also the name of his principal, otherwise he will be held to guarantee the genuineness of the signatures.⁶

§ 114. **What he does not warrant.**—When, however, the bonds or other securities transferred are the genuine paper of the municipality, but are void for want of power to issue them, the transferrer does not by mere delivery warrant them to be valid,⁷ and the transferee cannot recover from him unless the vendee receives from the vendor a warranty that they are valid obligations.

The case of *Otis v. Cullum*, 92 U. S. 448, is a case illustrating this point.

The city of Topeka, Kansas, under authority of the Legislature, issued its bonds for certain purposes, which, in *Loan Asso. v. Topeka*, 20 Wall. 655, were declared to be void because issued for private purposes.

Some of these bonds were sold to the First National Bank of Topeka, and suit was brought against the receiver of the bank to recover back the money paid, based upon the grounds of a failure of consideration.

The court by Swayne, J., in affirming the judgment of the court below in dismissing the suit, said :

¹ *Rogers v. Walsch*, Am. Law Mag., Vol. 1, § 732.

² *Benj. on Sales* (6th ed.) 638. The vendee must return or offer to return the bonds before suit brought. *Smith v. McNair*, 19 Kan. 330.

³ *Parson N. & B.* 39 ; *Danl. Neg. Instr.*, Vol. 1, § 732.

⁴ *Littauer v. Goldman*, 72 N. Y. 506.

⁵ *Daniel on Neg. Instruments*, Vol. 1, § 733.

⁶ *Brown v. Ames*, (Minn.) 61 N. W. R. 448.

⁷ *Ruohs v. Third Nat. Bk.*, 94 Tenn. 57 ; 28 S. W. R. 303.

"The plaintiffs in error got exactly what they intended to buy and did buy. They took no guaranty. They are seeking to recover, as it were, upon one while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume. Such securities throno the channels of commerce which they are made to seek, and where they find their market, they pass from hand to hand like bank notes. The seller is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. When there is no express stipulation there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate his terms and refuse to buy unless it be given. If not taken he cannot occupy the vantage ground upon which it would have placed him. It would be unreasonably harsh to hold all those through whose hands such instruments may have passed liable according to the principles which the plaintiff in error insists shall be applied in this case."

§ 115. **Registered bonds.**—Registered bonds are not negotiable; in fact, the object of registering them is to render them non-negotiable, and after they are registered they are transferable only upon the books of the corporation. Usually such bonds have printed upon their backs a blank form of power of attorney to be executed by the person whose name the bonds stand in on the corporation books, authorizing the corporation to transfer the bonds upon its books to the assignee or transferee to be named therein. They are then registered in the name of the transferee and likewise assigned.¹ Sometimes

¹ *Cronin v. Patrick Co.*, 4 Hughes, 428; *Savannah & M. R. R. v. Lancaster*, 62 Ala. 563; *DeVoss v. City of Richmond*, 98 Am. Dec. 653.

In the case of *Bunch's Ex'rs v. Fluvanna Co.*, (Va.) 10 S. E. R. 532, it appeared that a county court ordered that the full amount be

borrowed, and that registered bonds be issued and sold. In an action on a county bond alleged to be one of those thus issued, payable to plaintiff's decedent B., the latter's name did not appear on the official books of the agent of the county, who was directed to receive the

there is a provision in the ordinary negotiable bond that the holder may surrender it and receive in its place a registered bond. Such a provision does not affect the negotiability of the bond, but authorizes any holder of it to exercise the option and obtain in the place of the bond a registered one which will stand on the books of the corporation in his name and transferable in the manner aforesaid.

Sometimes the ordinary negotiable bond has printed upon it blanks to be filled in by the municipal authorities, so as to render the bond a registered one, at the request of a holder. Just what effect this mode of registration would have upon the rights of a *bona fide* holder has not been, so far as the writer knows, decided, but he is of the opinion that the registration, since the fact would appear upon the bond, would be notice to all purchasers, but not as to the coupons when detached, before maturity, from such bonds when in the hands of a *bona fide* holder, unless the coupons themselves disclosed the fact of such registration.

The purchaser of a stolen or lost registered bond cannot recover on it, because, it being non-negotiable, the owner from whom it was stolen or who lost it still retains in law the title to it, as he does to any personal property other than negotiable paper lost or stolen before maturity.

When the assignment upon the registered bond is filled up, except as to the name of the assignee, which is left

<p>money on such bonds, and who at the time of trial was deceased, though such books contained a list of names of persons from whom money was obtained on the bonds. The bonds issued under the order were not negotiable, and recited that they were transferable only on the books of the county, and were sold at par. Though it appeared that B.'s name in the bond sued on was in the county clerk's writing, there was no evidence that</p>	<p>B. paid value for it, or as to how he obtained it. No demand was made on it for more than fifteen years after it purported to have become due. Two companies, who, with the deceased agent, were appointed to raise money on the bonds, testified that they had no recollection of selling a bond to B. The court held that a finding was warranted that the bond was issued without authority, if issued at all, and was void.</p>
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blank and signed by the person in whose name the bond stands in, on the books of the corporation, the bond then becomes negotiable and may be passed from hand to hand until the blank is filled up.

The remarks contained herein in reference to the power to issue negotiable bonds, the performance of prior conditions, the effect of recitals and of estoppels, as well as the manner of enforcing payment, applies with equal force to registered bonds.

It is only as to questions which apply to commercial paper alone that the law differs as to the rights of the holder of a registered bond as distinguished from a negotiable one.

§ 116. **Who are bona fide holders.**—A *bona fide* holder of a negotiable bond or other negotiable paper is a second or other subsequent holder of it, who takes it for value in good faith before maturity, and without notice of defects, and such a holder obtains a perfect title and may hold it against the world. It becomes his absolutely, with the right to demand payment of it for himself, and, if necessary, to enforce its collection in his own name, and his privies have the same rights.

A person may be entitled to all the rights of a *bona fide* holder, even if he knows of defects in the title to negotiable paper, if he himself receives it before maturity and for value from a *bona fide* holder.¹ As said by Mr. Justice Field :

“The rule has been too long settled to be questioned now, that whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. His own title and right would be impaired if any restrictions were placed upon his power of disposition.”²

A pledgee, or one who takes negotiable instruments for a debt, or one who pays less than par for them from a

¹ Scotland Co. v. Hill, 132 U. S. 167. ² Cromwell Co. v. Sac., 97 U. S. 59.

former holder, is a *bona fide* holder and is entitled to all rights as such.¹

A person who takes bonds in payment of an antecedent debt is held to be a *bona fide* holder.² So also a person who takes bonds in pledge to secure payment for materials furnished is held to be a *bona fide* holder for value.³ A person who receives a negotiable bond before maturity for value and without notice, which has been lost or stolen, is a *bona fide* holder and may hold it against the former owner ;⁴ but if the bonds or coupons were overdue when stolen or lost and a person then receives them for value, he is not a *bona fide* holder and cannot recover on them.⁵

A *bona fide* holder can recover the full value of the bonds and coupons, although he paid less for them than their value.⁶

§ 117. **Bona fide holders after maturity.**—And although the holder acquires title to a bond or other negotiable instrument after it becomes due, yet if he receives it from one who became a *bona fide* holder before maturity, he is protected by the title of his transferrer and is himself entitled to all the rights of a *bona fide* holder. This is the rule as to negotiable paper.⁷

Mr. Burroughs, however, states that a person who receives a municipal bond after maturity, although he pay value for it, takes it subject to all defences which exist between the corporation and the original payee.⁸

It would seem that the same rule should apply to negotiable bonds that applies to any other negotiable paper, and that if the person from whom the holder obtained the matured bond was himself a *bona fide* holder, or the

¹ Fowler v. Strickland, 107 Mass. 552 ; Cromwell v. Sac Co., 96 U. S. 51.

² Foote v. Hancock, 15 Blatch. 343.

³ Allen v. Dallas R. R. Co., 3 Woods, 316.

⁴ Elizabeth v. Force, 29 N. J. L. 587 ; Battles v. Loundenslayer, 84 Penn. 446.

⁵ Vermilyea v. Adams Ex. Co., 21 Wall. 128.

⁶ Cromwell v. Sac Co., 96 U. S. 51 ; Park Bank v. Watson, 42 N. Y. 490.

⁷ Daniel on Neg. Instr., Vol. 1, §§ 782-786.

⁸ Burroughs on Pub. § 2, p. 155.

bona fide holder of one who obtained it before maturity, the last holder should be protected by the title of his transferor and have the same title to it. The rule as to other negotiable paper is, that if the holder obtain it before maturity and without notice, he obtains a good title, although his transferor had a bad one, but if he obtains it after maturity he obtains as good a title as his transferor had.¹ And this rule applies to negotiable paper payable to bearer because such paper stands upon the same footing as other negotiable paper.²

§ 118. **Rights of original holders.**—When aid is to be extended to a railroad company upon certain conditions, and the bonds are issued to the company, it is not a *bona fide* holder, nor is any person who receives the bonds from the company knowing that the conditions were not performed.

And when negotiable bonds are given to a contractor for work done he is not a *bona fide* holder, but his transferee will be, if he purchase them before maturity, for value and without notice of equities.

When the municipal corporation has power to issue and sell its negotiable bonds, the transaction between the corporation and the purchaser of the bonds from it is regarded as a loan to the corporation of the purchase price of the bonds.³

And the original purchaser of the bonds cannot be said to be a *bona fide* holder, because he takes the bonds subject to all irregularities or defects to which he is a party, but aside from this he is not to be held to a greater degree of care than any subsequent purchaser.⁴ And the corporation will be estopped either by its recitals in the bonds, or its records, to set up a defence against the bonds while in the hands of the original purchaser from it, to the same extent as if the bonds were held by a second or other subsequent holder, except as to such defences as

¹ Daniel on Neg. Inst. § 782; 724 *a.* *Phillips v. Brown*, 1 Flap, 188; *Griffith*

² *Sac Co. v. Cromwall*, 96 U. S. *v. Burden*, 35 Iowa, 143.
51.

³ *Hogg v. Town of Greenwich*. *Griffith v. Burden*, 35 Iowa, 143.
133 N. Y. 152. See however *Mem-*

exist between the original purchaser and the corporation, and they are such as exist between the immediate parties to all negotiable paper.

§ 119. **What may be inquired into between the original parties.**—It may be shown that there was no consideration paid, or less than a full consideration ; that the bonds were sold for less than par ; that the bonds were issued for a fraudulent purpose, not apparent on the face of the bonds, or irregularly issued, and that the purchaser knew of it, and any other defects of which the purchaser had knowledge may be shown.

As soon, however, as the original holder parts with a bond or other negotiable municipal paper, which between himself and the corporation is subject to the above defences, and it passes into the hands of another person for value before maturity and without notice of the said defects, the subsequent holder becomes a *bona fide* holder, and holds the bonds or other paper free from all such defences.

§ 119 *a*. **Lis pendens and judgment as notice.**—The doctrine of *lis pendens* has no application to negotiable paper, and the holder of negotiable bonds is not therefore affected by any litigation of which he is not a party, and a decree or judgment in such a suit will not bind him ;¹ but if he purchase such paper after maturity and after it has been adjudged void he is bound by the judgment.²

Notwithstanding an injunction restraining municipal officers from disposing of negotiable bonds, such bonds, if negotiated, are in the hands of an innocent purchaser for value before maturity valid obligations.³

And a *bona fide* holder of bonds or other municipal negotiable paper is not affected by a judgment to which he was not a party in a suit declaring the bonds or such other paper void, although he purchased them after the date of the judgment.⁴ In all these cases, however, the

¹ Endfield v. Jordan, 119 U. S. 680 ; Kieffer v. Ehler, 18 Pa. St. 388 ; Leitch v. Wells, 48 N. Y. 586 ; Scotland Co. v. Hill, 132 U. S. 107 ; Daniel on Neg. Inst. 800 *a*.

² Louis v. Brown, 109 U. S. 162.

³ Carrol Co. v. Smith, 111 U. S. 556.

⁴ Stewart v. Lansing, 101 U. S. 505.

bonds or other such paper, if adjudged void for want of power, will be void in any person's hands.

§ 120. **Presumption that holder has good title.**—The holder of a negotiable bond or coupon is presumed to have paid full value for it, and also that he acquired it before maturity in good faith and in the usual course of business.

But after it has been shown that the bonds were fraudulently issued or were lost or stolen, then the holder must show that he is a *bona fide* holder for value, without notice and before maturity, or the transferee of such a holder.

§ 121. **Overdue coupons—As notice.**—The presence of overdue coupons coupled with other indications of invalidity, may prove sufficient to put a purchaser on inquiry,¹ but the mere fact that one or two instalments of interest are overdue or unpaid, disconnected with other facts, is not sufficient to affect the position of one taking the bonds, and subsequent coupons, before their maturity as a *bona fide* holder.²

As stated by Field, J., in *Cromwell v. Sac Co.*, 96 U. S. 51, the presence of such coupons usually denote merely some temporary financial pressure or falling off of expected revenues or income, or other causes having no connection with the original validity of the bonds, and to hold in such cases all bonds and coupons to be dishonored paper would greatly impair the currency and credit of such securities.

The presence of a large number of attached matured unpaid coupons has been held to be sufficient notice to put a purchaser on inquiry, particularly when the purchaser was a broker or one acquainted with the course of dealing in bonds.³ The character of the business of the purchaser sometimes enters into the question of notice, a man of business affairs being held to a greater degree of care than a person unacquainted therewith.⁴

¹ *Parsons v. Jackson*, 103 U. S. 762. ³ *Lythe v. Lansing*, 147 U. S. 59.

² *Briggs v. Town of Phelps*, 70 Fed. Rep. 29. ⁴ *Briggs v. Town of Phelps*, 70 Fed. Rep. 29.

§ 122. **Purchaser not bound to follow proceeds.**—A *bona fide* holder of municipal bonds is not bound to follow the proceeds, and if the bonds are issued for a lawful purpose, or if, on their face, they appear to be issued for a lawful purpose, when in fact they are issued with the intent to use their proceeds for an unlawful purpose, and such purchaser had no knowledge of these facts, such fact cannot be pleaded or shown as a defence against such holder.¹

It was held in a case where an ordinance authorized the issue of bonds for the purpose of securing funds with which to aid indigent families, the fact that such funds were misapplied by the officials did not affect the rights of *bona fide* holders for value. They were not required to look further than the ordinance to see whether the purpose for which the bonds were issued was a legitimate one.²

And where the bonds on their face recited that they were issued pursuant to the enabling act, which legally permitted their issue, and the bonds in fact were applied by the common council for an unlawful purpose, they were held valid in the hands of a *bona fide* holder and the city estopped to plead the illegal use of them.³

Even if the bonds do not contain recitals of the pur-

¹ *Cairo v. Zane*, 149 U. S. 122; *Omaha Bridge Cases*, 10 U. S. App. 101, 189; *West Plains Tp. v. Sage*, 69 Fed. Rep. 943. In *National Life Insurance Co. of Montpelier v. City of Huron*, 62 Fed. Rep. 778, the bonds recited they were issued "to raise funds for the purchase of a school site, and for the erection of a school building thereon."

They in fact were issued to raise money for the purpose of conducting a campaign for the State capital, and the money was so used.

The court held the bonds to be valid in the hands of a *bona fide* holder, holding that the recital in

the bonds precluded the proposed defence.

The court in this case said: "That a municipal corporation has given away or squandered the proceeds of negotiable securities which it placed upon the market, cannot affect the rights of *bona fide* purchasers who had no knowledge of nor part in the gift or waste. They are in no ways responsible for the wise and economical use by the corporation of the funds it borrows."

² *Lynchburg v. Slaughter*, 75 Va. 57.

³ *Risley v. Village of Howell*, 64 Fed. Rep. 453.

pose of the issue, the *bona fide* holder of a negotiable instrument issued by a municipal corporation under a *general* power to borrow money will be protected and the bonds held valid, although the money obtained from the sale of the bonds be misapplied or used for an unlawful purpose. It is only when a corporation having the power to borrow money for a special purpose issues its bonds and they contain no recitals, and the records of the corporation do not disclose for what purpose the bonds are issued, that the defence of an unlawful use of the funds can be set up against the holder.

In such a case it may be well said that the money borrowed for the unlawful purpose to which it is appropriated, and there being no recitals in the bonds, and nothing appearing upon the records to the contrary, the defence is open to the corporation, although the bonds be in the hands of a *bona fide* holder.¹

It has been held that bonds issued to refund other bonds are void in the hands of a *bona fide* holder if the proceeds of the new bonds are diverted and not applied to the payment of the old bonds, and the new issue together with the other indebtedness exceeds the constitutional indebtedness.²

§ 123. **What notice affects bona fide holders.**—Gross negligence on the part of a purchaser of municipal negotiable paper, if he be a *bona fide* purchaser, does not affect his title. In addition to gross negligence or carelessness the purchaser must have actual knowledge of facts which would be sufficient to place him upon his guard, as where bonds are lost or stolen, he must have knowledge of the fact. It is not sufficient to affect his title that had he exercised any degree of care he would have ascertained the bonds were lost or stolen, and that he was purchasing them either from the finder or the thief, as the case might be. Parties about to purchase an unmatured negotiable paper are not bound to make in-

¹ Barnett v. Dennison, 115 U. S. 135; Hackett v. Ottawa, 99 U. S. 86. See §§ 217, 218.

² Doon Township v. Cummings, 142 U. S. 366.

quiries in relation to it of which they have no notice either from the paper or communicated to them.¹

The authorities hold that even gross negligence in the purchaser does not of itself make him *mala fide*.

The leading case on this point is *Murray v. Lardner*, 2 Wall. 110.

In this case the bonds, which were negotiable bonds payable to bearer, were stolen from their owner Murray and the next morning were purchased by Lardner, who was a broker doing business in New York, and who purchased them in the usual course of his business. In *detinue* for the bonds brought by Murray against Lardner the point was made that the broker had been grossly negligent in taking the bonds and was therefore guilty of bad faith. The court refused to adopt this view, and held that actual *mala fides* was necessary to overthrow the title of the purchaser, and that gross negligence did not constitute *mala fides*.

Mr. Justice Swayne in this case said :

“The possession of such paper (negotiable) carries the title with it to the holder. The possession and title are one and inseparable. The party who takes it before due for a valuable consideration, without knowledge of any defect in the title and in good faith, holds it against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title.

“The result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. . . .

“Where there is no fraud there can be no question. The circumstances mentioned and others of a kindred character, while inconsistent in themselves, are admissible in evidence, and fraud established, whether by

¹ *Murray v. Beckwith*, 81 Ill. 43; *Houvy v. Eppinger*, 34 Mich. 29.

direct or circumstantial evidence, is fatal to the title of the holder.”¹

In the recent case of *Clark v. Evans et al.*, decided January 2, 1895, in United States Circuit Court on appeal, the action was commenced in the United States Court in Indian Territory by the holder of a note against the makers, who claimed as a defence that the note had been obtained from them by fraud and was without consideration and the plaintiff had knowledge of these facts before she purchased the note. The plaintiff claimed to have purchased the note for value and before maturity and without notice. There was evidence tending to support the contention of each party.

The court charging the jury in part said :

“ If you believe . . . the plaintiff had knowledge of such facts as would put a prudent man on inquiry, and that inquiry, if prosecuted, would have led to a knowledge of the fraud, then you will find for the defendants.”

The U. S. Circuit Court held that “ knowledge of such facts as would put a prudent man on inquiry ” will not suffice, and granted a new trial. The court cited with approval *Murray v. Lardner* ; *Hotchkiss v. Banks*, 21 Wall. 354 ; *Kneeland v. Lawrence Co.*, 140 U. S., 209.

§ 124. **Defences against bona fide holder—When corporation estopped.**—Want of power to defeat his title may always be shown in an action brought on bonds or coupons by a *bona fide* holder. And where the municipality has not the power to issue the bonds they are void in all hands. All the cases admit this principle.

The broad statement is sometimes made that when the municipal corporation has the power to issue negotiable bonds they are valid in the hands of a *bona fide* holder and are subject to no defences. This statement must be qualified, and in addition to the mere power and issue of the bonds there must be an estoppel of some kind, either :

1. By recital on the face of the bonds made by authorized officers.

¹ See *Morgan v. U. S.*, 113 U. S., 491 ; *Morris Canal & B. Co. v. Fisher*, 1 Stockt. (N. J. Ch.) 667.

2. By the records of the proceedings of the board, body or officers authorized to issue the bonds.

3. By payment of interest, retention of consideration, acquiescence, or laches.

The reader is referred to these subjects treated of elsewhere herein.

And although any one of the three estoppels may exist, the bonds will still be void if some constitutional or statutory provision is not complied with, as registration, when the constitution or statute requires the bonds to be registered; or the creation of a sinking fund, and the statute or constitution declares that unless these conditions be complied with the bonds shall not be valid.¹

And though the bonds contain recitals, they may still be void in the hands of a *bona fide* holder, when the law requires that he should ascertain for himself whether or not the bonds should have been issued, or where issued, in part or in whole, in excess of the statutory or constitutional limitation.²

As the rights of *bona fide* holders of bonds are treated of in all parts of the work, it is unnecessary to further refer to them here.

§ 124 a. **Stolen and lost bonds.**—If the bond or other negotiable instrument issued by a municipal corporation is stolen from or lost by the owner before maturity, and finds its way into the hands of an innocent purchaser, such purchaser can hold it against all the world, even though he purchased the bonds directly from the thief or the finder,³ and as said in the case of *Battles and Webster v. Laundenslager*, 84 Pa. St. 446, “The latest decisions both in England and in this country have set strongly in favor of the principle that nothing but clear evidence of knowledge or notice, fraud or *mala fides*, can impeach the *prima facie* title of a holder of negotiable paper taken before maturity.”

¹ See these subjects treated of elsewhere herein.

² See subject of Bonds in excess of constitutional limitation herein, § 221 *et seq.*

³ *City of Elizabeth v. Force*, 29 N. J. L. 587; *Dutchess Co. M. Ins. Co. v. Hatchfield*, 73 N. Y. 223.

If, however, the instrument is incomplete, as if any essential part is blank, and is afterwards filled in by the thief or holder through the thief, no recovery can be had.

In the case of *Ledwich v. McKim*, 53 N. Y. 307, the place of payment was left blank, and before it was filled up by the president, the bonds were stolen. It was held that a *bona fide* holder could not, by inserting the name of a place in the blank, recover. In *Jackson v. Vicksburg Co.*, 2 Woods, 141, on precisely similar facts the same result was reached.

In *Mass. v. Missouri R. R.*, 11 Hun, (N. Y.) 8, the corporate seal of the obligors and the endorsement of the trustee were both wanting when the bonds were stolen; subsequently these were forged, and then the bonds came into plaintiff's hand. The company was held not liable.

It has been held that the thief's inserting the name of the payee in the blank left for that purpose was not such an alteration as would avoid the bond.¹ Bankers and brokers, after actual notice of the theft, should retain a memorandum thereof in order to indentify stolen bonds, etc., if presented.²

The question whether the custom of bankers and brokers to disregard such notices, together with the magnitude of their business, constitutes *mala fides*, is a question for the jury, and the fact that the real owner gave immediate notice of the theft by publication, will not of itself deprive the holder of his right to recover.³

The mere changing of the number of a stolen bond by the thief will not avoid the bond in the hands of a subsequent *bona fide* holder, nor is it sufficient to place him upon his guard.⁴

Whether an alteration apparent upon the face of a note or bond is material or not is a question for the court.⁵

If negotiable municipal bonds are stolen and the city

¹ *Boyd v. Kennedy*, 9 Vr. 146.

⁴ *City of Elizabeth v. Force*, 2

² *Vermilye v. Adams Ex. Co.*, Stew. (N. J.) 587.

²¹ Wall. 138.

⁵ *Hill v. Calvin*, 4 How. 231;

³ *Seybell v. Nat. Currency Bank*, *Wheelock v. Freeman*, 13 Pick.

² Daly, 383.

(Mass.) 165.

is notified, it is not protected by the subsequent payment of coupons to one who does not show himself a *bona fide* purchaser for value before maturity ;¹ where the coupons are stolen after they have matured and come into the hands of an innocent purchaser such purchaser will not have a good title to them as against the former holder.²

¹ Bambridge v. Louisville, 83 Ky. 285. | Hinekey v. Union Pac. R. R. Co.,
23 Albany L. J. 38 ; Dill. on Mun.

² Wylie v. Speyer, 62 How. 107 ; | Corp. (4th ed.) § 555.

CHAPTER X.

RENEWAL AND FUNDING BONDS—REGISTRATION OF BONDS.

SECTION.

125—When renewal and funding bonds may be issued—Cannot be issued without authority.

126—What authority necessary to issue such bonds—Must be either express, or the general power to issue bonds.

127—When the new bonds are valid although the old ones were void—Cases—When new bonds void.

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SECTION.

newal bonds do not create a new debt.

129—When the renewal bonds must be issued—Usually must be before the old ones are paid.

130—Registration of bonds—When void if not registered—When registration unnecessary.

131—When registration conclusive of the facts—Statute or constitution must require registration—What facts registration concludes.

§ 125. **When renewal and funding bonds may be issued.**—It is the common practice for municipal corporations, when unable to meet their maturing bonds, or when desiring to fund their floating indebtedness, to issue bonds, which in the first instance are usually called renewal or refunding bonds, and in the latter funding debt bonds. Many of the States have passed general laws authorizing the issue of such bonds, and the charters of the municipalities also have, in many instances, like provisions.

When the authority to issue such bonds is express and certain, and is followed in detail, there can arise but few questions as to the validity of the bonds so issued, but when the authority is vague, or not strictly pursued, many vexed questions arise.

When the municipality has the power generally to issue bonds, it may, without express authority, issue bonds in lieu of others overdue, and the municipal authorities are the judges of the propriety of such action,¹ but when it

¹ *City of Quincy v. Warfield*, 79 Am. Dec. 330.

has issued bonds without authority, it has no power to issue, without special authority, other bonds to replace or take up and pay off the former bonds.¹

Where, on the maturity of valid municipal bonds, the municipality, without legislative authority, takes them up and issues others in their stead, not having the means to pay the matured bonds, such second issue are void for want of authority.²

It has been held that without authority, but merely from the fact that the city was indebted on its valid obligations, it could change the form of such indebtedness and issue renewal or funding bonds to renew or fund its existing debt. The principal case holding this doctrine is that of *City of Galena v. Corwith*, 48 Ill. 423, wherein it was held that "a city being in debt which is evidenced by scrip or by promissory notes may surely change the form of the indebtedness to interest-bearing bonds, and this without express authority in its charter." The court further said that "it is an inherent power and vital, without which such corporations could not live."³

The city, however, had the right to borrow money upon its faith and credit to the amount of twenty thou-

¹ *Merrill v. Monticello*, 138 U. S. 673. modified in form, not in substance, and these were the only ones, with

² *Jefferson v. Hawkins*, 23 Fla. 223; *Whitewell v. Pulaski Co.*, 2 Dill. 249. In *Town of Solon v. Williamsburgh Sav. Bk.*, 114 N. Y. 122, it was held that railroad aid bonds issued by commissioners in the place of other bonds, which were issued to aid a railroad and by it were surrendered and cancelled by the commissioners, were valid obligations in the hands of a purchaser for value without notice, although the later bonds were payable at a different place and the denomination greater than surrendered bonds. in this case that the commissioners who issued the bonds were not bound by statute or vote to issue the bonds payable at any particular place or bound to issue them of any particular denomination, these details being left by statute to their determination. See also *Williamsburgh Sav. Bk. v. Town of Solon*, 136 N. Y. 460.

The court said: "The practical effect of this subscription of the bonds was not an excessive issue, but the continuance of those issued," ³ See also *Rogan v. Watertown*, 30 Wis. 259.

sand dollars per year, and the bonds issued were to fund a part of the debt so incurred. And in the subsequent case of *Hardin v. McFarlan*, 82 Ill. 140, the court criticised the broad language of the former case, and held that a municipality cannot issue bonds, unless authorized to borrow money, and is not restricted in the means of exercising this power.

§ 126. **What authority necessary.**—From a careful review of the authorities it appears that a municipality cannot issue renewal or funding bonds, unless it is expressly authorized so to do, or unless it has the power generally to issue its negotiable bonds or the general power to borrow money.¹

The case of *Portland Savings Bank v. City of Evansville*, 25 Fed. Rep. 389, is a case in point.

The common council of the city was authorized "to borrow money for the use of the city," and under this authority it issued its renewal bonds, and in holding these bonds to be valid the court said :

"It involves no inconsistency to say that such a grant of power embraces, not by implication, but by force of the expression, the right of the city, whenever the common council shall deem it necessary or advantageous, to execute new obligations in renewal or redemption of old ones, or in order to obtain money to pay the old ones, if due, or even before they matured, if thereby a reduced rate of interest or other benefit can be obtained."

An act conferring on a municipality authority to refund matured and maturing indebtedness has been held to authorize the funding of debt created after the passage of the act.²

And where the proceeds of the bonds were misapplied it has been held the city could issue other bonds in their stead. In this case, however, there was no limitation as to the amount that could be issued, and the issue of the additional bonds was necessary to complete the water-works for which the former bonds were issued.³

¹ *Bogart v. Lamotte Tp.*, 79 Mich. (Kan.) 28 Pac. R. 560; 54 Kan. 463, 294.

³ *Daily v. City of Columbus*, 49

² *Riley v. Township of Garfield*, Ind. 169.

§ 127. **When new bonds are valid, although the old were void.**—When the renewal or funding bonds recite that they are issued for the purpose of funding the existing debt of the city or renewing the old bonds, and the city is authorized to issue such bonds, it is estopped as against a *bona fide* holder to set up that the antecedent debts were fraudulent.¹

When the determination of the question of what debts or bonds are to be paid or renewed by the new issue is left to the municipality or its officers, and they are to pass upon the question, and they, in the new issue, make such recitals so as to mislead a purchaser or to lull his suspicion and not lead him to inquire whether the old debts were invalid or not, such recitals will estop the municipality from pleading that the old debts were invalid.²

The case of *Cadellac v. Woonsocket*, 58 Fed. Rep. 935, is one in point.

In this case it appeared the city was authorized: "When deemed necessary by the council to extend the time of payment, new bonds may be issued in the place of former bonds 'falling due,' . . . each bond shall show upon its face the class of indebtedness to which it belongs and from what fund it is payable," the court held that "the general power to issue must be taken to authorize bonds in the usual form of such well-known commercial obligations." The usual form embodies a contract and obligation usual in form.

The court further held that, as the bonds recited, they were funding bonds and issued to take the place of former bonds falling due, that they showed upon their face the class of indebtedness and the fund out of which they were payable.

¹ *Nat. Bank v. Town of Granada*, 41 Fed. Rep. 87, where the bonds were issued in exchange for debts of the municipal corporation, as against a *bona fide* holder, if they contain recitals, the illegality of the old debts cannot be shown. See also *Hill v. Peekskill Sav. Bk.*, 101 N. Y. 490. See, however, *Meyer v. Brown*, 65 Cal. 583; 26 N. E. R. 281, it was held that

² *Hill v. Peekskill Sav. Bank*, 101 N. Y. 490; *Ashley v. Supervisors of Presque Isle Co.*, 60 Fed. Rep. 55; *Hitchcock v. Galveston*, 96 U. S. 350; *Sykes v. Laffery*, 27 Ark. 407. See, however, *Meyer v. Brown*, 65 Cal. 583; 26 N. E. R. 281, it was held that

In this case, the former bonds for which these bonds were issued were void, and the court held that the refunding bonds were valid. The court said: "It seems to us that the representation made on the face of the bonds estops the city as against a *bona fide* holder from disputing the fact that the bonds were issued to take up 'old bonds falling due.' Power was conferred by the act upon the common council to issue new bonds to take up bonds falling due.

"The question whether there were any such bonds was referred to the common council.

"The council determined to issue new bonds to take them up.

"It seems to us that upon these circumstances it did not devolve upon the purchaser of the new bonds to look into the validity of the funded old bonds. He might well rely upon the representations made to him on the face of the bonds, as to the existence of 'the old bonds falling due.'

"The recitals in the new bonds as to the fact of 'old bonds falling due,' and that the new bonds were issued to take up the old, would well lull an intending purchaser into security.

"The defence it might have made to the old bonds it elected not to make: it should not now be permitted to set it up as against a *bona fide* holder of its refunding bonds."

In another case,¹ where it was contended that the funding bonds were void, because the original bonds were invalid, the court said:

"Suppose the improvement bonds were void, as it is claimed, does it follow that the bonds that were given in substitution for them are likewise nullities? It will be observed that if we assume that the city exceeded its power in borrowing the money represented in such improvement bonds, nevertheless the fact remains that the city had incurred honest debts in the laying out and improvement of its streets, and that the money so borrowed went to the payment of such honest debts. The munic-

¹ Mutual Ben. L. Ins. Co. v. Elizabeth, 42 N. J. L. 235-240.

ipality, therefore, was under a moral obligation to repay the money so borrowed, and the consequence is, that upon well-settled rules it was entirely competent for the Legislature to convert such moral into legal obligations. When, therefore, by this act of 1871, the city was authorized to renew such bonds, and substitute in their place this class called 'consolidated improvement bonds,' such an authority was a validation of the original loan, and a recasting of it into a new form. I entertain no doubt that such new bonds, corroborated by this legislative sanction, are in all respects valid and enforceable. The rule settled in the case of *Rader v. Township of Union*, 10 Vroom, 519, is entirely pertinent and is quite decisive. In that case it was conceded that the contract then in question was palpably *ultra vires*, as it had been made by an ostensible corporate body, which in point of law had no existence, but as the subject of such contract had inured to the benefit of the township of Union, the burden of payment could by legislation be lawfully imposed on that township. I consider, therefore, that on the concession of the illegality of the improvement bonds, still their substitutes were made valid by the legislative act from which they proceed."

§ 128. **Rights of bona fide holders—Debt limitation.**—When the renewal bonds do not contain recitals of such a character as to mislead an innocent purchaser, or they are made by officials having no authority to make them, such renewal bonds are void in the hands of a *bona fide* holder, and the municipality is not estopped from setting up the defence that the original bonds were illegally issued.¹

It has recently been held that bonds issued by a municipality under an act which permitted their issue to fund the debts of the municipality, are valid in the hands of a *bona fide* holder, although issued in payment of claims which the officers issuing the bonds knew to be illegal.²

A holder of valid bonds who surrenders them and receives in lieu thereof bonds which are afterwards held

¹ *Merrill v. Monticello*, 138 U. S. 673. | ² *Meyer v. Brown*, 26 Pac. Rep. 281.

invalid, may maintain an action on the original bonds, although cancelled and not in his possession.¹

A city cannot compel the holder of old bonds to surrender them and take in their place new ones at a premium, though that is the then market value.²

It has been held,³ where a city issued currency in such a form as to circulate as money, contrary to statute, which was afterwards paid out by it for valid municipal indebtedness, and it afterwards, under a general authority to fund its debts, exchanged its negotiable bonds for such currency, that although the latter was invalid and could not have been enforced, yet as the consideration received by the city for it was lawful and the city was morally bound to pay the currency, and the illegality only extended to the form, the bonds so exchanged were valid obligations.

A municipal corporation may purge a transaction of its illegality,⁴ provided it had the power to incur the debt, and the objection extends only as to the illegal manner in which the power is executed.

If the original debt was incurred without power and therefore void, and afterwards the evidence of such debt is surrendered and exchanged for bonds, or other bonds, the writer is of the opinion that such funding bonds would also be invalid, no matter what recitals they contained, unless the statute authorizing their issue was broad enough to remove the defect of the original want of power, and this defect was statutory and not constitutional, as in the latter case a statute could not cure it, unless the constitutional lack of authority arose from the form of the prior act and not from its object. And this principle is asserted in the case of *Mosher v. The Ind. School Dist. of Ackerly*, 44 Iowa, 122. It appeared that it was sought by statute to give to the holders of bonds issued in excess of the constitutional limit of Iowa, a lien for the materials furnished in the erection of the school-building erected

¹ *Deyo v. Oteo Co.*, 37 Fed. Rep. 247.

² *Loyd v. City Altoona*, (Pa.) 19 Atl. R. 675.

³ *Little Rock v. Merchants' Nat. Bk.*, 98 U. S. 308.

⁴ *Dill*, on Mun. Corp. (4th ed.) § 448.

with the money obtained from the sale of the bonds. The court held such a statute to be unconstitutional ; that it was but an attempt to change the nature of an indebtedness prohibited by the constitution.

And in a case in the Federal court for Iowa,¹ arising upon a suit to collect bonds issued to refund other bonds which were in part in excess of constitutional limit of indebtedness of that State, the court said : “ In suits, therefore, upon refunding bonds representing prior indebtedness, it is necessary, in order to sustain the defence of invalidity, to show that the indebtedness merged in and represented by the refunding bonds was itself invalid, and non-enforceable either in whole or in part.”²

It is also held that the question of the issue of the new bonds does not require the consent of the legal voters if the statute or constitution does not require it, although that consent was necessary to issue the original ones.³

The renewal bonds are not regarded as a new debt, but the mere extension of the former debt, and therefore they are not included in the debt limitation placed upon the municipality, nor does the prohibition in the charter that the municipality shall not create pecuniary obligations which shall not be payable in the current year, or which cannot be paid from the income of the current year, prohibit the issuing of renewal bonds, such exchange not creating any new obligation.⁴

¹ *Ætna Life Ins. Co. v. Lyon Co.*, 44 Fed. Rep. 329.

² See, however, *Chaffee Co. v. Potter*, § 230.

³ *Blanton v. McDowell*, 101 N. C. 532.

⁴ *City of Poughkeepsie v. Quintard*, 136 N. Y. 275.

In this case the purchaser refused to take the bonds issued to fund old bonds of the city, issued to pay for water works. The new bonds being issued under a subsequent general statute permitting all cities to refund their debt, the purchaser claimed that the sale of the

new bonds increased the debt beyond the limit, and further that the charter of the city prohibited the borrowing of money for the purpose of funding the debt.

The provision in the charter relative to borrowing was as follows :

“ The common council shall not have power to borrow, and is expressly prohibited from borrowing, any money on account of the city except as herein provided.

“ The said council shall not create any pecuniary obligations whatever on the part of the city which shall not be payable in the current year.

§ 129. **When the renewal bonds must be issued.**—The renewal bonds should be issued before the old bonds, intended to be refunded or paid by the sale of the renewal bonds, are paid and cancelled, otherwise the renewal bonds are void in the hands of the purchaser from the city with knowledge of this fact, and the issue of renewal bonds in such a case may be restrained.

It has been held that renewal bonds issued in the place of bonds theretofore paid, discharged and cancelled, were issued without authority and were void,¹ but in this case the bonds were not delivered, and the question was not therefore between the municipality and a *bona fide* holder for value without notice, and we do not know of a decided case where the question has been passed upon wherein the renewal bonds were issued after the old ones proposed to be renewed were paid and cancelled, and such new bonds had passed into the hands of an innocent holder for value. Certainly, if the recitals in the new bonds were such as to mislead the purchaser, or were such as he had the right to rely upon, the bonds would be valid, but if they contained no such recitals or there was no other estoppel, it would seem in such a case as if the bonds would be void, because the purchaser would be charged with constructive notice of all the proceedings of the municipality and an investigation would disclose the fact that the new bonds had been issued after the old ones had ceased to exist.

and which cannot be discharged from the income of the same year."

The court held that the provision of the charter related to new debts and not to the extension of one already existing, that the funding act and the charter should be read together, but if they could not the funding act would repeal by implication the charter provision so far as it related to the object of the funding act.

In *Powell v. City of Madison*, 107 Ind. 106, it was held that the prohibition in the Indiana constitution,

art. 13, "No political or municipal corporation in this State shall ever become indebted in any manner or for any purpose to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation," did not prevent a municipal corporation from issuing bonds, with interest coupons, for the purpose of funding debts existing prior to the adoption of the prohibition.

¹ *Coffin v. City of Indianapolis*, 59 Fed. Rep. 221.

The question, however, depends largely upon the enabling act, as a proper construction of that might permit the payment of the old bonds and the issue of the renewal bonds afterwards, and the replacing of their proceeds into the account out of which the old bonds were paid.

Funding bonds issued to take up county warrants, or to fund a debt, part of which is in excess of the constitutional limitation, are void, unless the valid can be separated and distinguished from the invalid, notwithstanding any recitals they may contain,¹ unless the bonds expressly recite that they are not issued in excess of the constitutional limitation, and do not disclose any facts which would inform a purchaser to the contrary, and the recitals are made by officers charged with determining the facts recited.²

§ 130.—**When void if not registered—When not necessary.**—Some of the States require that all bonds issued by municipalities shall be registered with a State official before they can be legally issued.

The purpose of such acts being to guard against the issue of fraudulent bonds, unless the condition is complied with the bonds are not lawfully issued.³

And when the statute or the constitution⁴ declares that unless the bonds are registered by some State or other officer and have his certificate endorsed thereon they shall be void, they are void in the hands of even a *bona fide* holder, if not so registered and certified, as this provision then is *imperative* and all persons must take notice of it.⁵

In the case of *Wood v. Louisiana*, 5 Dill. C. C. R. 122, where it appeared a municipal corporation issued bonds valid on their face, but which were antedated to avoid their being registered under a subsequent act, it was held

¹ *Lake Co. v. Graham*, 130 U. S. 662; *Millerstown Bro. v. Frederick*, 114 Pa. St. 435.

² *Potter v. Chaffee Co.*, 33 Fed. Rep. 614.

³ *Douglass v. Lincoln Co.*, 2 Me. Cray. 419; *Young v. Clarendon*, 132 U. S. 340.

⁴ The constitutions of Nebraska, N. Dakota and Wyoming contain such provisions.

⁵ *State v. Roggen*, 22 Neb. 118; *Anthony v. Jasper Co.*, 101 U. S. 693.

that while the bonds themselves were void, yet as the corporation had the power to borrow money, and the proceeds of these bonds went into the city treasury and was used for a lawful purpose, an action for money had and received against the corporation could be brought by the purchaser or his assigns for the amount paid for the bonds to the corporation, with interest at the lawful rate.

Where the statute makes the certificate of the registration officer conclusive as to the facts recited in the bond, the effect of such recitals is the same as if they were made by the municipality itself or its officers, and it, and they, will be estopped by such recitals from denying their truth.¹

A recital in a municipal bond that it was issued in accordance with authority conferred by an act recited, and in accordance with a vote of a majority of the qualified voters, is sufficient to validate the bonds in the hands of a *bona fide* holder. The certificate of the auditor of the State thereon that the bond was regularly issued, that the signatures were genuine, and that the bond had been duly registered, is conclusive upon the municipality, when the officer so certifying is charged with that duty.²

Where the act directs that a municipal officer keep a registry of the bonds and does not require that the bonds themselves be endorsed, that they were registered, or provide that in case of non-registration they shall be invalid, bonds issued pursuant to such a statute are unaffected by the neglect of the officer to comply with the directions of the statute.³

§ 131. **When registration is conclusive of facts.**—In order that the registration of the officer shall be conclusive, it is necessary that the statute should so make it, and when the statute does not make the registration conclusive and the bonds are issued without compliance with conditions precedent, the fact that they are registered by the State officer does not make them valid.⁴ In

¹ Flagg v. School Dist. No. 70, 58 N. W. R. 499.

³ First Nat. Bk. v. Arlington, 16 Blatchf. 57.

² Comanche Co. v. Lewis, 133 U. S. 198.

⁴ Dixon Co. v. Field, 111 U. S. 83; Crow v. Oxford Town, 119 U. S. 215.

the case of *German Sav. Bank v. Franklin Co.*, 128 U. S. 526-540, Mr. Justice Blatchford said: "The registration of the bonds by the State Auditor has nothing to do with the nature of the terms and conditions on which the stock was voted and subscribed. Neither the registration, nor the certificate of the register, covers or certifies any fact as to the compliance with the conditions prescribed in the vote, on which alone the bonds were to be issued."

And when the statute makes it the duty of the registration officer before he registers bonds to ascertain whether all the prior conditions have been complied with, his decision, evidenced by registering and certifying the bonds, is final on the facts he is to pass upon and will estop the corporation from alleging non-performance of such prior conditions as a defence.¹ If the act requires that the bonds be registered by an officer and have the fact of registry certified, it is held that if they are so certified, the fact that they were not in fact registered cannot be shown in order to invalidate such bonds.²

The purchaser of an unregistered bond acquires no new rights when the statute provides that the bond must be registered to be valid, but when the statute requires bonds to be registered and permits new bonds to be issued to a subsequent holder upon surrender of the old bonds, the municipality will be precluded to set up, as against the transferee, equities existing between it and the transferrer.³

¹ *Flagg v. School Dist. No. 70*, 58 N. W. R. 499; *Menasha v. Hazard*, 102 U. S. 81, 87. ³ *Lewis v. Barbour Co.*, 105 U. S. 739; *Anthony v. Jasper Co.*, 101 U. S. 693.

² *Township of Rock Creek v. Strong*, 96 U. S. 278.

CHAPTER XI.

MUNICIPAL PAPER PAYABLE IN GOLD—HOW MUNICIPAL PAPER PAID—BY TAXATION—WHEN OUT OF GENERAL OR SPECIAL FUND OR TAX—SINKING FUND—TAXATION OF BONDS.

SECTION.

132—When municipal paper may be made payable in gold coin—When not.

133—Municipal debts are paid by taxation—When power to tax implied.

134—When bonds are payable out of the general fund—Rights of creditors.

135—Special assessment bonds—How payable.

136—When bonds are payable out of a special fund—Rights of creditors.

137—Sinking fund—Special tax—When bonds void unless such provision made.

SECTION.

138—When bonds not void although such provision not made—Effect of recitals—Courts not likely to hold bonds valid, although they recite such provision has been made, when it has not and State constitution requires it.

139—Taxation of bonds—They may be taxed unless exempt.

140—Where bonds must be taxed—Tax cannot be deducted from the interest due on them.

§ 132. **When municipal paper may be made payable in gold coin.**—Many of the bonds now issued by municipal corporations provide that the principal and interest thereof shall be payable in gold coin, and it would seem, from a careful review of the few decisions on this subject, that a municipal corporation may, unless restrained by its charter, or some other law, or the State constitution, contract that the principal and the interest of its bonds shall be paid in gold coin, as fully as if the contract were made by an individual.¹ But in one case,² where bonds in

¹ Moore v. Walla Walla, 60 Fed. 40 Pac. R. 900; Poland v. Pleasant Rep. 961; Farson, Leach & Co. v. Hill, 3 Dill. 195; Heilbron v. Cuthbert of Com'rs, 16 Ky. L. 856; Bert, (Ga.) 23 S. E. R. 206.

Judson v. City of Bessemer, 87 Ala. 240; Skinner v. Santa Rosa, (Cal.) (1889).

suit were issued payable in gold, at a time when gold was at a premium and under an act of the Legislature of Missouri (March 17th, 1871), which authorized their issue, and provided that the bonds should be paid in money, the court held the bonds to be void, and said :

“When the bonds embraced in this suit were issued ‘gold coin’ was not the basis of the business of the country.

“It was money, but of much greater value than the circulating medium, consisting of the United States treasury notes and national bank notes, of which we take judicial notice, because it is part of the public history known to all the world, and therefore including us. All debts payable in dollars were, as now, solvable in legal tenders, but an obligation payable in gold coin can be discharged only according to its terms.

“In authorizing the issue of the bonds for \$100,000, and in the use of the term ‘money,’ the Legislature must be supposed to have meant, in the act cited, that money which constituted the basis of the general business of the country and was a legal tender for the payment of debts.

“Therefore there was no authority in the act for the issue of bonds payable ‘in gold coin,’ and they were void for want of authority for their issuance.”

This case therefore decided that if, at the time bonds are issued payable in gold coin, gold is at a premium, and the statute does not authorize the issue of gold bonds, but merely bonds payable in money, the term “money” means the usual circulating medium of the time of the issue, and therefore such bonds are void. This can be well understood, if at the time the suit is brought to enforce the payment of the bonds, gold is still at a premium, especially so if the bonds were purchased with money other than gold, but if at the time of the suit and after the bonds had matured, as in the present case, gold was no longer at a premium, why should the bonds be held invalid ?

When the statute prohibits the issue of bonds payable in gold, either in express words or by implication, they cannot be made so payable, and where the statute au-

thorizing the issue of bonds, or some general statute provides that "all debts should be paid either in standard silver or gold coin of the United States," bonds cannot be issued payable in gold coin, because the municipal corporation issuing them must have the option to pay them either in gold or silver and the proposed issue of such bonds will be restrained,¹ or if issued the municipality would still have its right to exercise its option.

§ 133. **Municipal debts are paid by taxation—When power to tax implied.**—The debts of a municipal corporation are paid by taxation. Their form may be changed, as where the general debts are funded and bonds issued to pay them, or bonds falling due when the municipality is unable to meet them, are renewed, yet in the end all the debts are to be paid by taxes levied upon the property of the inhabitants of or situate within the corporation.

Usually the charter incorporating the municipality or some special or general law authorizes the corporation to levy taxes to pay its debts, and this provision is sufficient to include the levy of taxes to pay the principal and interest of bonds or other evidence of municipal indebtedness, and it is not necessary that the statutes authorizing the issue of bonds or other paper by a municipal corporation should expressly provide that the paper, so authorized to be issued, should be paid by the levy of taxes, because the power to pay is inherent in the power to borrow, and in order to pay the municipal corporation must impliedly have the power to tax in order to raise the money to pay with.

This proposition is well stated in the case of *Loan Asso. v. Topeka*, 20 Wall. 655, where the court said :

"The proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in the future, not limited to payment from some other source, imply an obligation to pay by taxation. . . . It is therefore to

¹ *Bannock Co. v. C. Bunting & Co.*, 37 P. R. 277; *Skinner v. Santa Rosa*, 40 Pac. R. 900.

be inferred that when the Legislature of the State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself or some general statute a limitation upon the power of taxation which repels such inference."¹

When the municipality contracting the debt has no general authority to levy taxes to pay its debts, but only limited authority to levy taxes for certain specified purposes or for limited sums, which do not include the power to levy taxes to pay its debts generally, or a sum sufficient to pay all its debts, and the act under which the debts were contracted or the bonds or other paper issued does not provide for their payment by taxation, it has been held in such a case that the power to levy taxes to pay the debts incurred pursuant to such an act was doubtful, and a writ of *mandamus* was refused,² and the court held the only relief for the creditor was the Legislature. Notwithstanding the above decision it seems to the writer that the act of the Legislature which confers upon a municipal corporation power to issue its bonds, impliedly authorizes the levy of taxes sufficient to meet the debt, unless the constitution of the State prohibited such implied power, or the statute authorizing the debt, or some general act, contained some provision which rebutted such an implication, and this position seems to be supported by the decisions of the Federal and state courts.³

¹ See also Desty on Taxation, Vol. 2, pp. 1079, 1193; *Young v. Com'rs.* (Ind.) 36 N. E. R. 1118; *Fieldman & Co. v. Charleston*, 23 S. C. 62; *Dill. on Mun. Corp.* Vol. 2 (4th ed.) § 741; *Tiedeman on Mun. Corp.* 256.

² *State v. Guttenberg*, 39 N. J. L. 660.

³ *Loan Asso. v. Topeka*, 20 Wall. 655; *United States v. New Orleans*, 98 U. S. 391; *U. S. v. Lincoln Co.*, 5 Dillon, 184; *Ralls Co. Ct. v. U. S.*, 105 U. S. 733; *Desty on Tax.* Vol. 2, 1079, 1193; *Dill. on Mun. Corp.* Vol. 2 (4th ed.), 763; *Young v. Board of*

Com'rs. (Ind. Sup. Ct.) 36 N. E. R. 1118; *Breckenbridge Co. v. McCracken*, 61 Fed. Rep. 191.

The court in the latter case said: "The power to assess, levy and collect a tax would be necessarily implied from the power to create the debt, there being nothing in the act indicating an expectation that payment should be made in any other way and no constitutional obstacle, either in the character of the debt or to the granting of such power by the Legislature being suggested."

§ 134. **Bonds payable out of a general fund.**—The bonds and other negotiable paper issued by a municipality ordinarily are general debts, and the holder is entitled to have them paid out of the general funds of the city, and it is to be inferred that the Legislature intends to authorize it to raise and pay them, and the interest thereon, as it falls due, by taxation, unless there is in the act authorizing the issue, or some general law, a limitation upon the power of taxation, which repels such an inference.¹

In a case² where it was claimed that the bonds in suit were not a part of the city debt, payment of which could be enforced by general taxation, or out of any fund except the specific assessment in view of which they were issued, the court, in dissenting from this view, said :

“The conclusive answer to this objection is that the obligation of the city, which is the foundation of the suit, is not thus restricted in its operation. The agreement contained in it is that the city will pay the money designated in it, not that it will pay such sum out of a particular fund. To introduce such a restrictive stipulation would be an unwarranted interpolation. Nor do I find in any of the provisions of law appertaining to the city anything from which such a circumscription of this contract can be effected by implication. The law which authorized the issuing of these instruments contains no intimation that they are not to be instruments imposing a general obligation to pay the money mentioned in them. They are the bonds of the city, and such bonds do not have the effect of imposing only a partial obligation. Nor does the fact that the city has a sinking fund devoted specially to the payment of these bonds as they mature, give rise to such an intendment. Such a contrivance is doubtless designed to put the city in funds to meet these debts as they fall due, but how such an expectation is to have the effect of converting a general engagement to pay into a particular engagement to pay only out of such fund is not apparent. The alteration of the contract from the unrestricted form of its ex-

¹ *Loan Asso. v. Topeka*, 20 Wall. 655, 660.

² *Mutual B. L. Ins. Co. v. Elizabeth*, 42 N. J. L. 235, 241-2.

pressed terms to the limited form insisted on, is so material and fundamental, that nothing but the plainest exhibition of a legislative purpose to so circumscribe the operation of these contracts should be permitted to control them in this particular. If the promise of the city was intended to be a qualified one, it was an easy thing for the Legislature to have so declared. The plain terms of the legislative authorization of the instruments conformably issued are not subject to a conjectural emendation. There is no solidity in this objection."

Even when a special tax is provided the holder is not limited to such a tax, unless it is provided they shall not be paid in any other manner.¹ Such bonds are the debts of the corporation, and after the application of the proceeds of a special levy the holder is entitled to have the balance paid out of the general funds of the corporation.²

In the case of *United States v. Clark Co.*, 96 U. S. 211, Mr. Justice Strong said: "Limitations upon a special fund provided to aid in the payment of a debt are in no sense restrictions upon the liability of the debtor. Why, then, must not the special tax of one-twentieth of one per cent be regarded as merely an additional provision made for the payment of the new debt authorized, rather than as a denial to the creditors of any resort to the ordinary source from which payment of county debts is to be made? Why should such a provision be construed as placing the holders of the bond in a worse situation than that of other creditors of the county? These bonds are a debt of the county as fully as in any other liability. Had the act which gave power to the county to issue them said nothing of any special tax, there could be no question that the holders of the bonds, like other creditors, would have a resort to the money in the county treasury collected for the discharge of its obligation; for it is by the law made the duty of the county court to order the payment out of the county treasury of any sum of money found by them to be due from the county. . . . And it is not to be inferred from a provision giving

¹ *Avery v. Job*, 36 Pac. Rep. 293. | U. S. 669; *Carrol Co. v. United*

² *United States v. Clark Co.*, 95 | States, 18 Wall. 71.

a creditor the benefit of a special fund that it was intended to place him in a worse condition than that he would have occupied had no such provision been made. And that, too, in the absence of any direction that he must look exclusively to that fund. Such is not a reasonable construction of the statute. Such is not a fair implication of its purpose. It accords neither with its letter nor with its spirit. . . . It is incredible that the Legislature intended to deny to the purchaser of the bonds any right to look for payment beyond such a meagre provision; or, if it was so intended, that the intention would not have been expressed in precise terms. In the absence of any express declaration that the creditor's right to claim payment shall not reach beyond the fund derived from the small special tax, we cannot think the Legislature proposed rendering the bonds unsalable or almost worthless in the hands of those who might be so unfortunate as to hold them. Such an intention would have defeated the object sought to be secured by giving authority for their issue. Nor can we think that the Legislature intended to set a trap for purchasers and lead them to suppose that they were obtaining valuable securities, when in fact they would obtain what was next to nothing. The statute justifies no implication of any such legislative intention. If it be said that the Legislature, in limiting the special tax allowed, contemplated no issue of bonds beyond what one-half of one per cent would pay, and did not anticipate the improvidence of purchasers who might buy bonds issued in excess of that sum, it may be answered that still a larger issue was in fact authorized."

In the case of *United States v. Ft. Scott*, 99 U. S. 152, the city issued its bonds under statutory authority, for the purpose of defraying the costs of paving, grading, etc., one of its streets, and the ordinance providing for the issue stated that they "should be paid, principal and interest, solely from special assessments to be made upon and collected solely from the lots and pieces of ground fronting upon or extending along the streets the distance improved."

The act under which the bonds were issued provided that "for the payment thereof assessments should be made upon the taxable property chargeable therewith;" that is, upon all lots and pieces of ground to the centre of the block extending along the street or avenue the distance improved. The bonds had printed on them that they were issued pursuant to said act and ordinance.

The special assessments collected were insufficient to meet and pay the bonds and interest as they became due, and the city refused to pay them out of its general funds. Suit was instituted in the U. S. Court, and Justice Harlan, who delivered the opinion, said in part:

"Experience informs us that serious, if not insuperable, obstacles in its negotiations, had the bonds upon their face in unmistakable terms declared that the purchaser had no security beyond the assessments upon the particular property improved. If the corporate authorities intended such to be the contract with the holders of the bonds, good faith required an explicit avowal of such purpose in the bond itself, or in some other form, by language brought home to the purchaser which could neither mislead nor be misunderstood."

The court further held that as between the city and the owners of the property liable the payment of the bonds should be made by special assessment, but as between the city and the holders of the bonds the city was primarily liable.

This would seem to be the law adopted in most of the States in regard to improvement bonds, issued for the purpose of making improvements to roads and streets, the cost of which is to be raised in whole or in part by the city,¹ but the courts of Indiana have, owing to the constitution of the State, adopted the opposite rule, and hold that such bonds are not a general debt of a municipality, but must be paid out of the special funds derived from the property benefited by the improvement.²

¹ *State v. Commissioners*, 37 Ohio, 526; *Wyandotte v. Zeitz*, 21 Kan. 649; *Kimball v. Grant Co.*, 21 Fed. Rep. 145. *Braun v. Board of Com'r's of Benton Co.*, 66 Fed. Rep. 476; *Walker v. Com'r's, Munroe Co.*, 38 N. E. R. 1095

² *Strieb v. Cox*, 111 Ind. 299;

§ 135. **Special assessment bonds.**—A number of the States have authorized their municipal corporations to issue what is commonly known as “Special Assessment Bonds,” and the enabling act expressly states that the bonds shall not be a general debt of the municipality issuing them, but that they shall be paid with the money obtained from the collection of assessment levied upon the property benefited by some local improvement paid for, or made with the money obtained from the sale of these bonds.

This mode of borrowing money by municipal corporations is often resorted to when the corporation has reached the statutory or constitutional limit of indebtedness ; as such bonds, not being a general debt of the corporation, are held not to be prohibited by the constitution, and are not to be included in the calculation of the municipal indebtedness in order to ascertain whether or not the corporation has reached its debt limit.¹

As these bonds are to be paid out of a special fund, that is, the assessment against the private property of the citizen, when collected by the city, they cannot be considered to be as safe an investment as bonds payable out of the general funds of the city.

§ 136. **When bonds payable out of a special fund.**—When bonds are payable out of a special fund, or from a special tax, and the amount levied is insufficient to pay the principal or interest, a *mandamus* will not lie to compel the levy of taxes beyond the amount authorized.

In *United States v. Macon Co.*, 99 U. S. 582, 590, Chief Justice Waite said : “ If the purchaser had examined the statutes under which the county was acting he would have seen what might prove to be difficulties in the way of payment. As it is he holds the obligation of a debtor who is unable to provide for the means of payment. We have no power by *mandamus* to compel a municipal corporation to lay a tax which the law does not authorize. We cannot create new rights or confer new powers. In this case it appears that the special tax of one-twentieth of one per cent has been regularly levied, collected and

¹ *Davies v. Des Moines*, 75 Iowa, 500.

applied, and no complaint is made as to the levy of one-half of one per cent for general purposes. What is wanted is the levy beyond this, and that, we think, under existing laws, we have no power to order."

Where a particular fund or a special tax is provided for the payment of the bonds and interest, these provisions become a part of the contract and cannot be rescinded or impaired.¹

Where the statute under which the bonds are issued creates a special fund for their payment, the city, on the insufficiency of the fund for any one year to meet the annual interest, does not become liable to pay interest on the over-due coupons.²

§ 137. **Sinking fund—Special tax—When bonds void unless such provision made.**—The constitution of a number of the States requires that at, or before, the time of the incurring of a debt by a municipality, a sinking fund shall be provided to pay the principal and interest of the debt as it falls due, or that provision for the collection of an annual tax to pay the debt shall be made. The constitution of the following States have such provisions: California, Idaho, Illinois, Kentucky, Missouri, New York; for water supply, Pennsylvania; annual tax, South Dakota, Texas, and West Virginia.

It has been repeatedly held that a failure to so provide will render the bonds or other evidence of municipal indebtedness void.³

A case illustrating the doctrine is that of *Quaker City Nat. Bank v. Nolan Co.*, 59 F. R. 660.⁴ The court held the bonds to be invalid because the Commissioners' Court who issued them failed to provide, as required by the constitution of Texas, provision to assess and collect annually a sum sufficient to pay the interest and create a sinking fund to pay the principal.

The bonds recited that they were issued in pursuance

¹ *Hoffman v. Quincy*, 4 Wall. 535; *Mobile v. Watson*, 116 U. S. 289. See subject Legislative control over remedies herein.

² *Bates v. Gerber*, 22 Pac. Rep. 1115.

³ *Milraps v. City of Terrell*, 60 Fed. Rep. 193; *Wilson v. Shreveport*, 29 La. 673; *Knox v. Baton Rouge*, 36 La. 427.

⁴ Affirmed in 66 Fed. Rep. 883.

of the act authorizing their issue, but did not state that all the requirements of the law had been complied with.

The Court also refused to be governed by the decision of the Supreme Court of Texas, *Nolan Co. v. State*, 83 Tex. 190, because the fact that the constitutional provision, requiring that provision for the annual payment of interest and the creation of a sinking fund, had not been presented to the State court or passed upon by it.

The same force and effect no doubt would be given to a statutory provision if it, in express words, provided that, in a case of failure to create such a sinking fund, the bonds should be void.

If the provision to raise the annual interest and create a sinking fund is sufficient at the time of the inception of the debt, that is all the law contemplates, and the bonds will be valid, notwithstanding that rate may in later years not be sufficient by reason of decreased values or default in payment of taxes, to raise the sum necessary for those purposes.¹

§ 138. **When the bonds not void, though no fund provided.**—It has been held, however, in Texas, that when the commissioners appointed to erect a court-house were authorized to issue bonds to obtain the money therefor, but the commissioners were not the body to create a sinking fund and provide for the payment of the interest on the bonds before their issue, as required by the constitution, and had no authority to do so, this duty being that of the county government; and it having failed so to provide, such failure did not invalidate the bonds.²

If the bonds recite on their face that all the provisions of the constitution relating to their issue have been complied with, and this recital is made by the body which is authorized to issue the bonds or their agents, and also the body required to provide the annual tax, then such bonds are valid in the hands of a *bona fide* holder, provided the constitution does not, *in express language*, make

¹ *Basset v. City of El Paso*, 28 S. W. R. 551.

² *Marion Co. v. Coler*, 67 Fed. Rep., 60.

such bonds invalid if the provision is not complied with.

A case illustrating this doctrine is that of *Nat. Life Ins. Co. v. City of Huron*, 62 Fed. Rep. 778.

This was a suit on coupons cut from bonds issued under a statute of South Dakota, where the constitution, sec. 3, art 13, requires that at or before the time of incurring an indebtedness the municipality should provide for the collection of an annual tax sufficient to pay the interest and also the principal when due. The bonds were executed by the officers designated in the enabling statute, and each bond recited "that all acts and conditions and things required to be done precedent to, and in the issuing of, said bonds have duly happened and been performed in regular and due form as required by law." In point of fact no provision whatever was made for the payment of the debt. The court held the bonds and coupons to be valid and the city estopped by the recitals to show that the constitutional provision was not in said respect complied with.

That as the city had the power to comply with the provision and having asserted by said recitals that it had done so, it could not dispute its own recitals to the prejudice of an innocent holder of the bonds.

As the constitution of South Dakota does not contain a provision that, in case of failure to provide for the special tax, the bonds should be void, the above decision cannot be regarded as deciding that bonds issued without such a provision as a sinking fund or an annual tax, declared to be void by the constitution in case of failure so to provide, would be still valid if they contained recitals which alleged the performance of the constitutional requirements.

It is to be doubted that the courts would declare such bonds to be valid in case of such failure, no matter what recitals they contain in the face of the express language making them void.

§ 139. **Taxation of bonds.**—Usually municipal bonds and other evidence of debt are not taxed by the municipality issuing them, nor are bonds issued by the State

usually taxed. The reason, the writer presumes, being that as State and municipal bonds are issued bearing a low rate of interest, if taxed like other property by the municipality issuing them, they would not find a ready sale, if a sale at all, at a low rate of interest, therefore it has been the custom not to tax them, but there can be no doubt that they are subject to a tax like all other property,¹ unless expressly exempt from taxation by legislation, as is now the case in a number of the States.

In the case of *The City Council of Augusta v. Dunbar*, 50 Ga. 387, where it appeared the city authorities had levied a tax, under its general power to tax, upon bonds issued by the State of Georgia, the court set the tax aside and held that the State ought not to be presumed to have granted to a municipal corporation, without plain words showing the grant, a power of taxation to depreciate the State securities, when to do so would be to do what the State itself ought not to be presumed to have done in the absence of clear language so declaring.

In another case in the same State,² the court held that a statute which authorized the levy and assessment "upon the taxable property of a State," did not authorize the levy of a tax on the bonds issued by the State when like words, in other statutes, had not been construed to include State bonds.

§ 140. **Where bonds must be taxed.** Bonds out of the State cannot be assessed against a resident, as they are to be treated as property where they are kept.³

Mr. Justice Field, in a case in the United States Supreme Court,⁴ said: "Public securities consisting of State bonds and bonds of municipal bodies . . . by general usage have acquired the character of and are treated as property in

¹ *Champaign Co. Bk. v. Smith*, 7 Ohio, 12; *People v. Home Ins. Co.*, 29 Cal. 533.

See, however, *Macon v. Jones*, 67 Ga. 489, where it was held that a power to tax all property within its limits did not authorize a city to tax its own bonds.

² *Miller v. Wilson*, 60 Ga. 505.

³ *Duncan v. County Court*, 69 Mo. 454; *Desty on Taxation*, Vol. 1, p. 56.

⁴ State tax on foreign held bonds, 15 Wall. 323.

the place where they are found, though removed from the domicile of the owner."

The tax on the bonds cannot be deducted from the interest on the bonds and the balance only paid, as was attempted by the city of Charleston, S. C., which passed an ordinance directing that its bonds should be taxed and the amount of the tax be deducted from the interest due on the bonds so taxed.

The United States Supreme Court¹ held that this ordinance was unconstitutional, as it impaired the obligation of the contract, which the city made with the holder of the bonds to pay a certain rate of interest ; that if the taxes were deducted from the interest the rate would be lowered, and the contract therefore impaired. The court intimated that a municipal corporation might tax its own bonds, but the implied power to do so did not enter into the contract to pay the interest, and was not a part of the contract ; that an express contract to pay the interest could not contain an implication or consist with a reservation directly contrary to the words of the instrument.

A municipal corporation cannot tax bonds held by a non-resident, if the bonds are also out of the State,² but if the bonds are within the State, although the owner is a non-resident, they are subject to taxation.

In *Fidelity, etc. Deposit Co. v. Scranton*, 102 Pa. St. 387, it was held that a statute which authorized "any borrower" to contract to pay the taxes of the loan and interest, applied to municipal corporations ; that such an agreement by the city of Scranton was valid ; that in issuing and selling its bonds it was a "borrower."

¹ *Murray v. Charleston*, 96 U. S. 432.

² *Cleveland, P. & A. R. R. Co. v. Penn.*, 15 Wall. 300.

CHAPTER XII.

SALE OF BONDS—SALE BELOW PAR—USURY—WHAT THE HOLDER IS CHARGEABLE WITH—BOUND BY ALL THE PAPER DISCLOSES.

SECTION.

- 141—Sale of bonds—Usually sold at public sale, but may be sold at private sale, unless prohibited—Right of bidders.
- 142—Transaction sometimes regarded as a loan—Often as a sale of chattels.
- 143—Municipal corporation may pay commission to a broker—In New York State cannot pay to any one else.
- 144—Delivery of bonds—What officers may make delivery—If officers make delivery without authority, when corporation bound.
- 145—Sale below par—What "Par" means—When bonds may be sold below par.
- 146—Sale below par prohibited—Rights of subsequent innocent holders.
- 147—Cases where sale below par was held not to affect the bonds in hands of inno-

SECTION.

- cent purchasers—Rights of original purchasers.
- 148—Usury defined—Effect on bonds—States where usury renders void paper affected in all hands.
- 149—Synopsis of the usury laws of the various States.
- 150—Holder of municipal paper must at his peril ascertain authority of corporation to issue it—Bound to inspect all authority referred to in the paper, and bound by all he might have learned.
- 151—Purchaser must examine the records—Bound by all he might have learned—Cases illustrating the doctrine—When purchaser excused.
- 152—Purchaser need not go behind the records.
- 153—Purchaser chargeable with all defects the bonds or other paper disclose—Bound by all he might have learned.
- 154—Same—Cases illustrating the doctrine.

§ 141. **Sale of bonds—Public and private sale.**—The customary mode of disposing of bonds by a municipal corporation is to advertise them for sale in some paper devoted to the publication of financial news and in the local papers soliciting bids for them, but unless the statute or ordinance pursuant to which they are issued, or some

provision in the charter of the corporation, or some general law, directs that they be sold at public sale, they may be sold at private sale or through an agent.¹

When the bonds are advertised for sale and bids solicited and proposals are received, the contract is not complete until the municipal corporation has accepted one of the proposals, and it is not liable in damages for refusing to accept an offer, though it be the highest regular offer made.²

And after the proposal is accepted and a deposit is made as an evidence of the good faith of the bidder, he need not take the bonds if they are for any reason invalid, and may recover his deposit.³

After the contract is completed the purchaser may compel the delivery of the bonds in an action for specific performance, or sue for damages, if the bonds are otherwise disposed of without his consent and to his loss. If the bonds are illegal, or irregularly issued, and for this reason not accepted or delivered, it is presumed the successful bidder could not recover damages from the corporation, because the corporation had no authority to sell void bonds, or bonds irregularly issued, and the purchaser had no intention to purchase such.

§ 142. **Transaction sometimes regarded as a loan—Also as a sale.**—The transaction between the purchaser direct from the municipal corporation, although in appearance a sale of bonds, is held in some cases to be a loan.⁴ the purchaser loaning the money to the corporation and receiving from it as security its negotiable bonds, but in a number of cases it is held that the transaction is a sale of the bonds as fully as if they were chattels.

In *Memphis v. Brown*, 1 Flip, 188, Emmons, J., said :

“These corporation securities under seal, made payable to bearer and intended for sale in the market, are negoti-

¹ *Blanton v. McDowell Co.*, 110 N. C. 532.

² *Coquard v. School Dist. of Joplin*, 46 Mo. App. 6.

In this case the notice inviting

bids reserved the right to reject any bid.

³ *Coffin v. Indianapolis*, 59 Fed. Rep. 221.

⁴ *Town of Hoag v. Greenwich*, 133 N. Y. 152.

able in as ample and as full a sense as the circulating medium of the country."

He then cited a large number of cases, and of these he says:

"Many go further and decide that these bonds are to be deemed essentially chattels and things *in esse*, and not mere choses in action.

"This has been done as often as exigencies have required it."

In *Griffith v. Burden*, 35 Iowa, 143, the court said:

"The authority to sell the bonds in the market is an incident attendant upon and growing out of the power to issue them. . . . And it follows that the right and title of the first purchaser directly from the municipality or corporation is as perfectly and fully enforced and protected as if he were a third person buying the bonds in a subsequent market sale.

"The character of the chattel attaches to them."¹

§ 143. **May pay commissions to broker.**—A municipal corporation has the authority to employ brokers to sell its bonds, and agree and pay for such services such compensation as is usually paid for like services by other corporations or persons who employ brokers.² It has been held in New York that when the person employed is not a broker, but merely a person to assist the municipal officers to sell the bonds, and therefore could give no services other than devolved on the municipal officers, the right to employ such persons will not be implied as incidental to the sale of the bonds.³ Putman, J., in the case cited, dissented from the opinion of the majority, and held that so long as the person was employed to sell the bonds it made no difference whether he was a broker or not.

In a recent case in California,⁴ the court held a contract by a county board to pay a commission to be void,

¹ *Memphis v. Bethel*, 17 S. W. to be done it authorizes all that is necessary for its performance." R. 191.

² *Brownell v. Town of Greenwich*, 114 N. Y. 519; *Mayor etc. of Edward*, 84 Hun, 26.

³ *Armstrong v. Village of Ft. N. Y. v. Sands*, 105 N. Y. 210, 218. ⁴ *Smith v. County of Los Angeles*, The court in the former case said: 99 Cal. 628.

"When a statute commands an act

but in this case the statute did not authorize the board to sell the bonds, but did the treasurer of the county with consent of the board, and expressly provided that the bonds should be sold to the highest bidder after advertising bids for the same.

When, however, the statute pursuant to which the bonds are issued, or some general statute, or the ordinance, or resolution providing for their issue prohibits the sale of the bonds for less than par, then a contract to pay a commission will be invalid,¹ because the payment of a commission will reduce the proceeds received from the sale below par, but if the agreement in such a case is that the commission shall be paid out of the premiums received from the sale of the bonds it would seem legal, or if the bonds sell above par, a commission may be allowed.

§ 144. **Delivery—What officers may make.**—The bonds are usually delivered by some officer of the corporation acting under the authority of the legislative board, or some of its committees, and when they are delivered by an officer of the municipality without authority and he should appropriate the proceeds, the holder would have no right to enforce payment,² because a municipality is not liable on bonds stolen and put on the market before they were issued by the municipal corporation, even in the hands of a *bona fide* holder;³ but it has been held

¹ Hunt v. Fawcett *et al.*, Co. *et al.* (53 N. Y. 315), in speaking of Com'rs, 8 Wash. 396; 36 P. R. 318; the implied authority of an agent Whelen's Appeal, 168 Pa. St. 162; to deliver or put in circulation a Village of Ft. Edward v. Fish, 33 N. Y. S. 784. negotiable instrument, said: "But this authority is not implied from the fact alone that the paper is in

² Portsmouth Savings Bank v. Village of Ashley, 91 Mich. 670. In hands other than those of him who is to be bound, but from that fact and clerk of the village were authorized to execute the bonds, but not to deliver them, or sell them, they without such authority delivered the bonds to the president joined with this other fact, that it has been by him intrusted to those hands for the purpose and with the intent that it shall go into use and circulation. . . ."

³ German Sav. Bank. v Village of Suspension Bridge, 73 Hun. 590. See, however, United States v. Cook, 12 Blatchf. 49.

The court in Ledwich v. McKim

that where the treasurer of a city, who had a large number of negotiable bonds lawfully in his hands, embezzled the bonds and coupons, absconded and appropriated the proceeds thereof to his own use, that the city was liable to the *bona fide* holder of such bonds.¹

In this case the charter of the city required that the bonds should be issued and sold only on the concurrence of three members of the board of finance, and the court intimated that had not the agreed facts in the case excluded this requirement its decision would have been contrary to the one rendered.

A municipality would perhaps be held liable on its bonds, even though the proceeds of a particular issue were stolen, if it had been the custom for a certain officer to receive the proceeds of and make delivery of its bonds to the purchasers thereof without special directions, and in the instance when the proceeds were stolen, the purchaser had dealt with such officer or officers and paid to him or them the purchase price of the bonds and had received the bonds in return, and there was nothing in the charter or ordinance relating to the issue of the bonds which required the approval of some other officer or body to the delivery. In such a case the municipality would be held to be estopped by the former course of dealing in such matters to set up the fact that the bonds were not in fact, in this particular instance, authorized to be delivered by it.

Two things must concur to create an estoppel by which an owner is prevented from asserting title to and is deprived of his property by the act of a third person without his assent.

1st. The owner must have clothed the person assuming to dispose of the property with apparent title to authority to dispose of it ;

2d. The person alleging the estoppel must have acted and parted with value upon the fact of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real.²

When the delivery is conditional the condition will be

¹ Cooper v. Mayor of Jersey City, 44 N. J. L. 634.

² Bernard v. Campbell, 55 N. Y. 456.

binding upon all who are cognizant of it or with notice chargeable of it.¹

§ 145. **Sale below par**—What is meant by the term “par.”—The term is extensively used in the commercial world and means value for value. “Par value,” means pound for pound, or dollar in money for every dollar of security.²

A bond or other security is sold at par when it brings its face value, including the interest due, and when it brings more or less than such nominal value, it is sold above or below par. When the exchange is made between the States or different countries, par value is held to be the equivalency of a certain amount of the currency of one country in the currency of another.³

An agreement to sell at their face value, bonds with several months' accrued interest, is an agreement to sell for less than par.⁴

When the statutes or ordinances do not prohibit the sale of bonds below par it is now generally held that the municipality may sell its bonds for less than par.

In several early cases,⁵ it was held that such a transaction was usurious, and that the bonds were therefore void.

And in another case, where warrants were given at the rate of seventy-five cents on the dollar to pay a judgment, they were held to be usurious and void.⁶

The present position of the courts is to regard the sale of bonds as a sale of chattels, and whatever they will bring in the market is their fair market value.

In the case of the City of Memphis v. Betchel, 17 S. W. R. 191, it appears that the bonds were sold by the city at the rate of eighty-five cents on the dollar.

The bonds bore interest at the rate of six per cent per

¹ Thomas v. Morgan Co., 39 Ill. 496; Com'rs Knox Co. v. Nichols, 14 Ohio, 260.

² Delafield v. Illinois 2 Hill (N. Y.) 158.

³ Bouv. L. Dict.

⁴ Village of Ft. Edward v. Fish, 33 N. Y. S. 784; Hunt v. Fawcett, 8 Wash. 396.

⁵ Town of Danville v. Southreland, 20 Gratt. (Va.) 550; Lynchburg v. Norwell, 20 Gratt. (Va.), 601; see also Com'rs of C. v. A. N. C. R. Co., 77 N. C. 289.

⁶ Clark v. Des Moines, 19 Iowa, 199.

annum. The court held that the sale was not usurious and said :

“It is fully established by a great preponderance of authorities, that there is a marked difference between individual securities and the bonds of municipal corporations in their origin, character and purpose.

“The bonds of municipal corporations are now recognized as negotiable in as full and complete a manner as bank bills or the national currency of the country.” The court then cited authorities to show that they are now regarded as chattels, and continuing, said :

“Assuming that these authorities establish the entire negotiability of the city bonds and the right of the city officers to sell them in the market as chattels, it is clear, that under the authority to sell them at their value, although that might be a greater discount than legal interest, the transaction would be neither usurious nor illegal, and therefore the city can neither raise a question of usury or scaling.”¹

That the bonds of a municipal corporation may be sold by it for less than par, must be regarded as the general understanding of law makers of the States as well as the officers of the municipalities, because, when it is desired to prevent such sale, that fact is incorporated in the enabling act or in the ordinance or resolution providing for the issue of the bonds.²

§ 146. **When sale below par prohibited—Rights of subsequent purchasers.**—Usually the statute authorizing the issue of the bonds, or the ordinance or resolution of the corporation providing for the issue of the bonds, contains a provision that the bonds shall not be sold for less than par, and it has been stated by several writers that such a sale will render the bonds void even in the hands of *bona fide* holders, and the two Virginia cases and the Iowa case above referred to are cited as authorities. After a very careful investigation of this subject we believe the law to be that bonds sold below par are not

¹ See also Griffith v. Borden, 35 ² See, however, the subject of Iowa, 143; Orchard v. School Dist. Usury, *post*, § 148.
No. 70 14 Neb. 378. }

affected by the provision, in either the enabling act or some general statute, or in the resolution or ordinance of the corporation providing that they shall not be sold for less than par, when such bonds have passed into the hands of a third person, who is a *bona fide* holder of them without notice, unless the statute *expressly provides* that if the bonds are sold for less than par *they shall be void*.¹

Although the first purchaser cannot so buy them, as he must take notice of the prohibition,² and therefore cannot purchase them for less than par so as to recover on them more than he paid, and may be compelled to surrender the bonds or return the excess,³ yet if he obtain the bonds for less than par and they pass into the hands of a *bona fide* holder, the latter holds them free from such latent defect.

The disobedience of instructions or fraud of the municipal officers in disposing of the bonds cannot affect them in the hands of the *bona fide* holder, under the well-known rule that irregularities and misconduct on the part of municipal officers do not affect the title of a *bona fide* holder of negotiable instruments.

§ 147. Cases where sale below par was held not to affect the bonds.—But a few of the State courts have rendered opinions on this point, and those which have are referred to.

The case of *Whelen v. City of Pittsburgh*, 108 Pa. St. 162, is one in point.

In this case it appears the city was directed by the act under which the bonds were issued to sell the same, but “said bonds shall not be sold for less than par and accrued interest, but the councils may allow a reasonable compensation for the sale or negotiation of the said bonds.”

The court held that such a compensation could not be allowed to the purchaser of the bonds as in effect would be a sale for less than par, and that a contract providing

¹ See subject of Usury, § 148
et seq.

² *Atchison v. Butcher*, 3 Kan.
104-121.

³ *Village of Ft. Edward v. Fish*,
33 N. Y. S. 784.

for the sale of the bonds embracing an agreement for such compensation was void and the same was upon the application of taxpayers by a bill in equity annulled. Some of the bonds had been delivered to the purchasers under the contract, and by them sold to innocent persons. The court held that the bonds in the latter's hands were not affected by the sale at less than par.¹

In the case of *Sherlock v. Winnetka*, 68 Ill. 530, where bonds had been sold below par contrary to law, the court held that while such sale would render the members of the body selling the bonds personally liable, yet it would not render the bonds invalid in the hands of an innocent holder.

In a case in Kansas² the court held that, between the parties, the bonds would be affected by a sale below par, but held "that if the bond had been negotiable and had passed into the hands of an innocent holder the defence could not have been made."³

In a case in New York, *Delafield v. The State of Illinois*,³ the Court of Appeals held that bonds of the State of Illinois sold for less than par by the agent of that State, contrary to the statute under which they were issued, which provided that the bonds were "not to be sold for less than their par value," were unaffected by such sale in the hands of a *bona fide* holder. The court said: "They are therefore binding to the full amount upon the State, in faith and honor, wherever they are presented by a *bona fide* holder, whatever may be the original equities between the State and Delafield," the purchaser. The court held that the original purchaser, who had notice of the prohibition, could be compelled to return all the bonds he had in his possession, or under his control, which he purchased below par.

The bonds mentioned in the above case were sold on credit without interest, while the bonds bore interest from

¹ See, also, to same effect *Williamsport v. Com'rs*, 84 Pa. 487; *Feet, Griffith v. Borden*, 35 Iowa, 143. *Lawrence Co. v. R. R. Co.*, 32 Pa. 141.

² *Atchinson v. Butcher*, 3 Kan. 198. ³ 29 Wend. 192. See, also, 22 Wend. 254.

their date, and the court held this to be a sale for less than par.

It is held to be a sale of bonds below par to sell the bonds nominally at par, and then to pay a commission to the purchaser, and a contract so to do is void where the statute directs that the bonds be sold for not less than par.¹

The United States Supreme Court, in one case, where bonds were given to a railroad and the statute provided that the bonds "should in no case or under any pretence be sold or assigned or transferred by the said railroad company at less than par value thereof," and the company sold them for about 66 2-3 cents on the dollar, held the bonds in the hands of a *bona fide* holder to be valid and unaffected by such sale.²

§ 148. **Usury—Effect of on bonds.**—Usury is the taking of a greater compensation for the use of money, or for the forbearance to compel the payment of money, than allowed by law.

Blackstone³ says that usury is "an unlawful contract upon a loan of money to receive the same again with exorbitant increase."

To be usurious the rate of interest must be greater than that allowed by law of the place of payment as well as the place where made.

In the following States the debt, if the contract is usurious, is void in all hands, viz. :

Arkansas, by the constitution, art. 19, sec. 13, which provides that all bonds, bills, notes and all other contracts at more than ten per cent are usurious.

New York, by statute : The debt, if the rate exceed six per cent, is void.

North Dakota : Forfeits the debt, but does not affect negotiable paper in the hands of a *bona fide* holder.

Minnesota : The debt is forfeited if the rate exceed ten per cent, but negotiable paper in the hands of a *bona fide* holder is not affected.

Oregon : The debt is forfeited to the school fund, but a

¹ Hunt v. Fawcett, 36 Pac. R. (83. See, also, Woods v. Lawrence 318.

Co., 66 U. S. 386.

² Mercer Co. v. Hackett, 1 Wall. ³ Bl. Com. 156.

bond *jude* holder may recover from his assignors or the usurer.

Whether bonds of municipal corporations in the above-named States, if sold at such an amount below par as to make the rate of interest usurious, will be void is still an open question, but the opinion of the writer is, they would be usurious.¹

If the bonds are to be regarded as a chattel and not as a loan, then they would not be usurious.² Or if the statutes which make the forfeiture apply only to private corporations and individuals, and not to municipal corporations, the bonds would not be affected, as the courts have, in several cases, held that an act which affected "corporations" did not apply to municipal corporations.³

In those States which have no usury laws⁴ a sale below

¹ *In Nalle v. City of Austin*, 22 S. W. R. 638, this was an action to cancel certain bonds to restrain the issue of others.

It was sought to cancel bonds which were sold for ninety-five cents on the dollar. It appeared that the proposition to issue the bonds submitted to the people contained no reference as to what price they would be disposed of. Before the election and after the ordinance ordering the election had been adopted, the council passed an ordinance providing that the bonds should not be sold for less than par, but before the sale of the bonds this last ordinance was repealed. The court said:

"The proposition submitted at the election did not limit the rate of interest the bonds were to bear.

"The question of discount in such a case in its final analysis is a mere matter of interest, and ought in no respect to affect the validity of the bonds, provided the discount and the interest expressed do not make the rate usurious.

"In this case the bonds bore interest at the low rate of five per cent,

per annum and the discount was only five per cent of their face value. Therefore the bonds are not invalid on that account."

² See § 145, *supra*.

³ The main purpose of the organization of a city or town is political, and the inhabitants do not, like the members of a private corporation, derive private or personal rights under the act of incorporation. In common parlance *towns* and *cities* are not known as *corporations*, but as *quasi*-corporations, and therefore a statute applicable to corporations or the officers thereof will not in general include towns or cities if there are no other or additional words, indicating an intention to include them. *Linehan v. Cambridge*, 109 Mass. 212. See, also, *State v. Newark*, 50 N. J. L. 550-8; also *Williams v. Nashville*, 15 S. W. R. 361.

⁴ The following States have no usury laws: Arizona, California, Colorado, Florida, Maine, Montana, Utah, Washington and Wyoming. Massachusetts and Michigan have practically none.

par, it would seem, cannot affect the bonds in the hands of innocent holders, unless the statute which provides that the bonds be sold for par makes them void, *by express words*, if sold for less. The penalty for usury in most of the States is but a forfeiture of the excess of the interest, or of the whole interest, as will appear from the following synopsis of the usury laws of the States.

§ 149. **Synopsis of the usury laws of the States.**—

Alabama : A rate not exceeding eight per cent may be taken; if more, then all interest is forfeited and the principal only can be collected. Civil Code, secs. 1750-54, 2879.

Arizona : No usury law; any rate agreed upon. Rev. St. sec. 2162.

Arkansas : Ten per cent, if more stipulated for, paper void. Const. art. 19, sec. 13.

California : No usury law; any rate agreed upon. Civil Code, sec. 1918.

Colorado : May stipulate for more than eight per cent. No forfeiture. Mills' Anno. Colo. Statutes (1891), sec. 2253.

Connecticut : Legal rate six per cent. No forfeiture, but only the legal rate recoverable. Conn. Gen. St. (1888), secs. 2941-3.

Delaware : Legal rate six per cent, if more taken loaner liable to forfeit amount of loan. Del. Rev. Code, ch. 63, sec. 1.

District of Columbia : Ten per cent may be stipulated for. Usury forfeits interest only.

Florida : Legal rate eight per cent; no usury laws.

Georgia : Legal rate seven per cent, but eight per cent may be bargained for; greater rate, excess of interest only forfeited. Georgia Code, 2050-57.

Idaho : Legal rate ten per cent, may agree for rate as high as one and a half per cent per month. Forfeiture for higher rate is at rate of ten per cent.

Illinois : Rate by agreement can be eight per cent. Penalty for usury is forfeiture of interest. S. & C. Ill. Annot. St. 1885, ch. 74, sec. 4-11.

Indiana : As much as eight per cent can be agreed

upon. When no stipulation rate six per cent. Forfeiture is of excess above six per cent.

Iowa : Ten per cent may be agreed upon. Forfeiture at rate of ten per cent to school fund for usury.

Kansas : May take as high as ten per cent by agreement.

Forfeiture of all excess over that rate. Kan. G. S. 1889, secs. 3498-9.

Kentucky : Legal rate six per cent. Usury forfeits excess of interest. G. S. ch. 60, secs. 1-4.

Louisiana : Eight per cent may be taken. If more taken does not affect the paper, but the excess may be recovered. Rev. Civil Code, arts. 1939, 2923.

Maine : No usury laws. Rate of interest when no agreement six per cent. Rev. St. ch. 45, sec. 1.

Maryland : Six per cent legal, if more taken excess forfeited. G. L. 1888, art. 49, secs. 1-6.

Massachusetts : Rate, when no stipulation, six per cent. Bonds of corporations not to bear more than seven per cent interest. Pub. St. 1882, ch. 77, sec. 3. Parties may stipulate for any rate except for sums less than \$1,000, the rate for such sums to not exceed eighteen per cent. Sup. to P. S. 388, sec. 1.

Michigan : Parties may agree up to ten per cent. Paper not affected, but the excess of interest not recoverable. Howell's Anno. St. 1594-96.

Minnesota : May stipulate for ten per cent. Usury avoids the contract. Innocent purchasers of negotiable paper protected. Kelly's Stat. 2089, 2092.

Missouri : As high as ten per cent may be stipulated for. Usury forfeits all interest, and renders void all mortgages and pledges of personal property. Laws 1891, p. 170.

Montana : Parties may stipulate for any rate ; legal rate when no agreement, ten per cent. Comp. Stat. 12368.

Nebraska : Ten per cent may be contracted for. Usury forfeits all interest. Consol. Stat. 1891, sec. 2021-25.

Nevada : May contract for any rate, when no agreement, then ten per cent. G. S. 4900-4.

New Hampshire : Legal rate six per cent. Contract not invalidated if more taken, but the person receiving interest above the legal rate forfeits three times the amount of the excess. Pub. St. 1891, ch. 203.

New Jersey : Legal rate six per cent. Usury does not avoid the paper, but forfeits all interest and costs. Act of Feb. 26th, 1878. Usurious contracts made in Monmouth County void. Rev. St. pp. 519-20.

New Mexico : May stipulate for twelve per cent. Usury forfeits double the amount of excess of interest above legal rate. Comp. Laws (1884), 1736-9.

New York : Legal rate six per cent. Usury avoids the contract. No corporation, however, can interpose the defence of usury in an action. N. Y. Rev. St. (8th ed.), Vol. 4, pp. 2512-15. Advances of \$5,000 and over on warehouse receipts, bills of lading, certificates of deposit and stocks, bills of exchange, bonds or other negotiable instruments pledged as security may bear any rate of interest agreed on in writing. Laws 1882, ch. 237.

Every banking association and every private banker doing business in New York may charge six per cent, and if more charged the whole interest shall be forfeited, and if paid, double the amount may be recovered. Laws 1882, sec. 68. This includes a partnership.¹

North Carolina : Legal rate six per cent. Usury forfeits the entire interest.

North Dakota : Legal rate seven per cent, but twelve may be taken if agreed upon in writing. The paper must show the amount agreed upon to be received for use by the borrower and separately the rate of interest to be paid. Usury renders the contract void, except negotiable paper in the hands of *bona fide* holders who are not to be affected. Commission beyond the rate of interest may be paid to a broker, but the interest and commission together must not exceed twelve per cent. Laws of N. D. 1890, ch. 184 and ch. 124.

¹ Perkins v. Smith, 116 N. Y. 441.

Ohio : Rate cannot exceed eight per cent. Excess over legal rate may be deducted. Negotiable paper in the hands of *bona fide* endorsers is protected. Rev. St. (S. & B.) secs. 3179-83.

Oregon : Rate of interest not to exceed ten per cent. If contract usurious the entire debt is forfeited to school funds. A *bona fide* assignee of a usurious contract may recover against his transferrer or the usurer the full amount paid him. Hill's Oreg. A. L. 1892, secs. 3587-94.

Pennsylvania : No more than six per cent can be taken ; if more, then the excess is forfeited. Contract not affected. *Bona fide* holders of negotiable paper are protected. Bright, Purd, Digest, Vol. 1, 926.

Rhode Island : No usury law. When no other rate agreed upon then, six per cent. Pub. Stat. 1882, ch. 141.

South Carolina : Parties may agree for as high as ten per cent, when no agreement then seven the rate. Usury forfeits all interest and costs.

South Dakota : As high as twelve per cent may be taken. Usury forfeits all interest ; debt not affected. Comp. Laws, secs. 3715-25 (1887).

Tennessee : No more than six per cent can be taken. Usury affects the excess of interest which is forfeited. Code, ch. 17.

Texas : As high as twelve per cent may be agreed upon. Usury forfeits all interest ; debt not affected. Sayles' Stats. arts. 2972-81.

Utah : No usury law ; if no agreement as to rate of interest, then ten per cent. Comp. Laws 1888, sec. 2119.

Vermont : No more than six per cent can be taken, excess over that amount cannot be recovered. No forfeiture of debt. Rev. Laws, secs. 1996, 2001, 3590 (1880).

Virginia : No more than six per cent can be taken. No corporation can plead usury. Usury forfeits all interest. Code 1887, secs. 2814-26.

Washington : No usury laws. If no agreement, then the rate is ten per cent. Hill's Wash. A. St. 1891, secs. 2397-8.

West Virginia : No more than six per cent can be taken.

If more taken, the excess is alone forfeited. No corporation can plead usury as a defence. Code 1891, 500.

Wisconsin: As much as ten per cent may be agreed upon; if no agreement, the rate is seven. Usury forfeits all interest, but does not affect the debt. S. & B. Wis. Anno. St. 1688-92.

Wyoming: No usury laws. When no agreement in writing as to rate, then the rate is twelve per cent. Rev. St. secs. 1310-11.

§ 150. **What the holder is chargeable with.**—The purchaser of a municipal bond or other municipal paper, whether negotiable or not, and whether the authority for its utterance be referred to in the paper or not, must ascertain for himself the authority under which the corporation has issued it, and if he fails so to do and it turns out that it was issued without authority of law, or for an unlawful purpose, or in a manner contrary to the enabling statute, and had he investigated the law he would have ascertained the fact, then the bonds will be invalid in his hands, unless (except in the case of want of power) the paper contains recitals which will estop the corporation from showing the bond to be invalid,¹ or the corporation be otherwise estopped.²

When the bond or other paper refers to the enabling act, or to some resolution or ordinance of the corporation providing for the issue of the paper, a purchaser, at any time, must take notice of all the terms and conditions and provisions of the statute, ordinance or resolution so referred to, and he is chargeable with whatever he would have learned had he inspected them. But when the bond recites that it is issued pursuant to the enabling statute, which is constitutional and gives the corporation authority to issue the bonds in question, and besides the enabling act the ordinance or resolution is referred to, which does not disclose on the face of the bond that it is in conflict with the enabling act, although an examination of it would disclose the fact, the *bona fide* purchaser, without

¹ City of Aurora v. West, 22 Ind. 89; Nat. Bk. of Rep. v. St. Joseph, 31 Fed. Rep. 216. ² See subject of estoppel herein, §§ 193 to 216; 240 to 252.

knowledge of the nature of the ordinance or resolution, need not examine it, but it will be deemed to be in conformity with the recited enabling act.¹

The holder of bonds must, at his peril, take notice of the existence and term of the law by which it is claimed the power to issue such bonds is conferred, and he is chargeable with notice of the statutory provisions under which they were issued.² As said by Chief Justice Waite in *McClure v. Township of Oxford*, 94 U. S. 429.

"Every man is chargeable of that which the law requires him to know, and that which, after having been put upon inquiry, he might have ascertained by the exercise of reasonable diligence." Where the constitution requires that at the time of issuing bonds provision shall be made for levying a tax to create a sinking fund for the payment of the principal and interest of the bonds when due, if no such provision is made the bonds are invalid in the hands of a *bona fide* holder, notwithstanding any recitals in them, because the purchaser is bound to know all the law which affects the issue of the bonds, as well as the particular law under which they are issued.³

§ 151. When the purchaser must examine the records—When excused.—When the enabling statute refers to certain records, as evidence of the existence of certain facts which are required to exist before the issuance of the bonds, then the purchaser must examine such records, and they, and not the recitals in the bonds, will control the validity of the bonds.⁴ An examination of the cases which require the purchaser to examine the records and ascertain for himself the existence of certain facts and does not permit him to rely upon the recitals in the bond or other paper, will disclose that the condition or requirements were either constitutional as well as stat-

¹ *Risley v. Village of Howell*, 64 Fed. Rep. 153; *Town of Brewton v. Spira*, 17 S. R. 660. ³ *Quaker City Nat. Bank v. Nolan*, 59 Fed. Rep. 660. See §§ 137, 138.

² *Bank v. City of St. Joseph*, 31 Fed. Rep. 216; *Anthony v. Jasper Co.*, 101 U. S. 693; *Francis v. Howard Co.*, 54 Fed. Rep. 487. ⁴ *Dixon Co. v. Field*, 111 U. S. 81; *Quaker City Nat. Bank v. Nolan*, 59 Fed. Rep. 660; *Francis v. Howard Co.*, 54 Fed. Rep. 487.

utory, or solely constitutional,¹ or the determination of the existence of the facts were not left to the officers issuing the bonds.

In the case of *Town of South Ottawa v. Perkins*, 94 U. S. 260-69, bonds were held to be void because the act which authorized their issue was not properly passed by the Legislature of Illinois as required by the constitution of that State. Mr. Justice Bradley, delivering the opinion of the court, said in part :

“Not only courts, but individuals, are bound to know the law and cannot be received to plead ignorance of it. The holder of the bonds in question can claim no indulgence on that score and can take no advantage from the allegation that he is a *bona fide* purchaser without notice.”

In the case of *Dixon Co. v. Field*, 111 U. S. 83, 93, the court said :

“If the fact necessary to the existence of the authority was by law to be determined, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one ; and the consequence would naturally follow that all persons claiming under the exercise of such a power might be put to the proof of the fact made a condition of its lawfulness, notwithstanding any recitals in the instrument.”

In a case in Illinois, *Bissel v. City of Kankakee*, 64 Ill. 249, where bonds in suit had been issued for a private purpose, and the suit was brought by a *bona fide* holder, the court, by Scott, J., said :

“The authority of a municipal corporation to issue bonds is derived from public laws, and the avenues to information in regard to the law and ordinances of such corporations being open to public inspection, the holder of such securities will be presumed to have examined them,

¹ See §§ 221 to 232.

and to have known whether the corporation had the requisite power to issue the bonds. He has no such opportunity in regard to private corporations. Their by-laws are not open to inspection by those who deal in securities issued by them, and hence the reason for the distinction that has been taken.

"The holder of the bonds involved in this action had every opportunity to know whether the city had any lawful right to issue them for the reason that its authority, if any existed, was to be found in the public statutes, and if he did not in fact examine them, as it was his privilege to do, before buying them, he will be presumed to have done so, and to have known they were issued without authority of law and therefore void in the hands of any holder, either with or without notice."

The purchaser of bonds is not bound by conditions which are not of record or of which the statute does not speak, provided he have no notice of them, as where the enabling statute made no reference to conditions, and the town imposed conditions which were unknown to the holder of the bonds. The bonds having been issued before the road was completed, and at the time the conditions were imposed, the court held the purchaser not bound by such conditions.¹

§ 152. **Need not go behind the records.**—A purchaser need not go behind the record of the corporation. The record of the proceedings resulting in the issue of the bonds is conclusive between the purchaser and the corporation.² A purchaser is not presumed to have notice of private or unusual instructions³ not contained in the proceedings relating to the issue of the bonds. As where a treasurer⁴ was authorized to sell city bonds which con-

¹ Brooklyn v. Ins. Co., 99 U. S. 362.

² First Nat. Bk. v. Concord, 50 Vt. 257.

³ De Vos v. City of Richmond, 98 Am. Dec. 616.

⁴ Suffolk Sav. Bk. v. Boston, 149 Mass. 361.

Where an agent was authorized

by a city to sell its bonds and he transcended the authority, it was held that the purchaser was not compelled to look to the records of the council, either for the appointment or instructions of the agent, since they were not necessarily of record. City of Indianapolis v. Skeene & Others, 17 Ind. 628.

tained a promise to pay the same at a certain date, and the treasurer made a contract in writing with the purchaser to pay a certain amount before maturity each year. The bonds afterwards passed, without notice, into the hands of others, and it was held that this arrangement was not binding upon such subsequent purchasers. The court said of the subsequent purchasers :

“He must see, at his peril, that the bonds were legally issued. Any purchaser of the bonds in question, if he examined the records of the city, would see that the city treasurer had full authority to issue the bonds in the form in which they were issued. We do not think that he was bound in the exercise of reasonable diligence to go further and look for a private agreement which was unusual and which he had no reason to suppose exists.

“The fact that such an agreement exists and is entered on the records of the committee on finance cannot justly be held to be constructive notice to him.”

§ 153. **Purchaser chargeable with what the bonds disclose.**—The *bona fide* holder of a municipal bond is chargeable with whatever defects appear upon the bond, and with such notice of failure to perform the prior condition which the recitals in the bond disclose. When the recitals are such as to put the purchaser upon inquiry, he is bound to pursue the same with diligence, and he is chargeable with whatever defects such an inquiry would have disclosed.

When the recitals in the bond are such as to estop the corporation, and are made by officers upon whom the law casts the duty of deciding whether or not the conditions precedent have been performed, and they certify that they have, then a *bona fide* holder can rest upon these recitals and they are a protection to his title, notwithstanding that, in point fact, the prior conditions have not been performed and the recitals are false. When the bond discloses on its face that there has been a failure to perform the prior conditions, or if they contain notice sufficient to put him upon inquiry, he is bound, as before stated, by all he might have learned had he pursued the inquiry.

A case illustrating this doctrine is that of *McClure v. Township of Oxford*, 94 U. S. 429. The bonds in suit were issued and bore date April 15th, 1872, and recited the act pursuant to which they were issued, and pursuant to a vote of the electors held April 8th, 1872. The act provided that thirty days' notice of the election was to be given, and that the act should go into effect after its publication in the "Kansas Weekly Commonwealth." The act was not published until March 21st, 1872; there was not thirty days' notice of the election given, between the time the act went into effect and when the election was held. The court held the bonds to be void for this reason.

Chief Justice Waite, who delivered the opinion of the court, said:

"To be a *bona fide* holder one must be himself a purchaser for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence.

"Every dealer in municipal bonds which upon their face refer to the statute under which they were issued is bound to take notice of the statute and all requirements.

"... These bonds bore date April 15th, 1872, and, pursuant to the express provisions of the act, contained a statement of the purpose for which they were issued, a reference to the act under which they are issued, and a result of the vote of the inhabitants on the question of their issuance, which is stated to have been taken April 8th, 1872. No valid notice of election could be given until the act went into effect, because until then no officer of the township had authority to designate the time or place of holding it. These bonds therefore carried upon their face unmistakable evidence that the form of the law under which they purported to have been issued had not been complied with, because thirty days had not elapsed between the time the law took effect and the date of election.

"If a purchaser may be, as he sometimes is, protected

by false recitals in municipal bonds, the municipality ought to have the benefit of those that are true.

“This suit was brought upon coupons detached from the bonds purchased by the plaintiff in error before maturity, but upon their face they refer to the bonds and purport to be for the semi-annual interest thereon. This puts the purchaser upon inquiry for the bonds and charges him with notice of all they contain.”

§ 154. **Same.**—For the reason that the purchaser is chargeable with knowledge of all the defects which the recitals disclose, it has been held that where the statute authorized the issue of municipal bonds to be made payable in not less than ten years from date, that such bonds issued under such statute payable in eleven days less than ten years from the date were void, even in the hands of a *bona fide* holder, and that an inspection of the act and bond together would have disclosed the defect.¹

Where a town was authorized to issue bonds in aid of a railroad and the bonds were to be sold and the money so raised invested in the stock of the railroad, instead of selling the bonds they were exchanged for stock, and the bonds recited on their face that they were given “for value received in the stock of the railroad,” naming the railroad to be aided, the court held the bonds void because on their face they disclosed the fact that they were issued contrary to the terms of the enabling act, and that if the purchaser had inspected the law under which they were issued, which all purchasers must do, he would have ascertained that fact.²

In another case,³ where it appeared under the enabling act the proposition to aid a particular railroad was submitted to the vote of the people and a majority decided in favor of such aid, before the bonds were issued the railroad voted to be aided consolidated with another, and the two companies so consolidated, before the subscription had been made, assumed another name. After-

¹ *People Bank v. School Dist. No. 52*, 57 Fed. Rep. 787. | 71 N. Y. 513; *Scipio v. Wright*, 101 U. S. 665.

² *Horton v. Town of Thompson*. | ³ *Harshman v. Bates*, 92 U. S. 569.

wards the bonds were issued reciting on their face the enabling act, the affirmative vote and the fact of consolidation.

There was no authority in the act to issue the bonds to aid the new company.

The court held the bonds to be void in the hands of a *bona fide* holder, and that the recitals in the bonds put the purchaser upon inquiry.

The court, on the effect of notice contained in the recitals of the bonds, said :

“ As sufficient notice of these objections is contained in the recitals of the bonds themselves to put the holder on inquiry, we think there was no error in the judgment of the Circuit Court.”¹

Where the city of New Orleans endorsed a negotiable bond and the endorsement recited that it was “ in conformity with resolution of said council of said municipality bearing date the 29th day of July and 5th of August last,” it was held that such recital charged all parties with notice of the authority granted by the resolutions, and, as the bond was endorsed in excess of the authority contained in the resolution, it was void.²

When the instrument refers on its face to the enabling act or some other authority for its issue, the holder is chargeable with such statute or other authority and all limitations and purposes thereof.³ And when the bond recites it is issued pursuant to an order of a court or an order or resolution or ordinance of a municipal body, the holder is bound by all he might have learned had he inspected such order, resolution or ordinance.⁴ Whatever authority authorizing the issue of the bond recited therein the purchaser must inspect at his peril.

¹ See, also, *Bates Co. v. Winters*, 97 U. S. 83-91.

² *Louisiana State Bank v. Orleans Nav. Co.*, 3 La. Ann. 297.

³ *Fiske v. City of Kenosha*, 26

Wis. 29; *Sutro v. Dunn*, 74 Cal. 595.

⁴ *Post v. Pulaski Co.*, 49 Fed. Rep. 628.

CHAPTER XIII.

REMEDIES.

Proceedings to restrain and compel issue of bonds—Action on bonds and coupons—Mode of enforcing payment—Effect of division of a municipal corporation—Statute of Limitations—Federal courts follow State courts—Legislative control over remedies.

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- 155—Proceedings to restrain issue of bonds—When action may be brought and by whom.
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SECTION.

187—Same—Cases.

188—When obligation of contract is impaired.

189—No vested right to a particular remedy.

SECTION.

190—When creditors are without means of enforcing their claims.

§ 155. **Proceedings to restrain issue of bonds—When action may be brought and by whom.**—It is the general rule of the State courts that a proposed illegal issue, in whole or in part, of bonds and other municipal evidence of debt, may be restrained and the proceedings authorizing their issue set aside.

Any taxpayer is entitled to this relief upon showing that by the issue his property, in common with that of other taxpayers, will suffer an additional burden if the bonds are issued.

The mode of relief is either by the common-law writ of *certiorari* or by proceedings in equity. Under the writ of *certiorari* the court will proceed to examine the proceedings of the municipal corporation, and if on review it is found the corporation has exceeded its powers, or has proceeded in an illegal manner, or the act under which the issue is made is unconstitutional, or the bonds are about to be issued in excess of the constitutional or statutory limitation, the court will reverse or annul the action of the municipality. This remedy is so common, so often used to review the proceedings of municipal corporations when they proceed to exercise illegal or unauthorized powers, or to exceed their powers, that it is unnecessary to cite authorities. This remedy, however, is ineffectual when the bonds have passed out of the possession of the municipal corporation or of its officers. Then resort to equity must be had to restrain their issue to innocent holders, as in the case of *Jackson Co. Sup. v. Brush*,¹ where it appeared bonds to aid a railroad were issued and placed in the hands of a third person for a railroad before the performance of certain conditions precedent. The holder was restrained by a bill in equity from delivering them, or making any disposition of them except to deliver them back to the county.

¹ 77 Ill. 59.

§ 156. **Equity will afford the relief.**—It is the practice in many of the States, in order to restrain the delivery of bonds illegally issued, to resort to a bill in equity, and it may be said that the great weight of authority is that a taxpayer can invoke the aid of a court of equity to prevent an illegal appropriation and disposition of municipal negotiable bonds. And one of the principal grounds for equitable relief is the fact that the bonds or other municipal paper are negotiable.¹ And aid is extended to the taxpayer to restrain the issue of the bonds or delivery of the bonds by the municipal officers, or the first purchaser, in order to prevent the delivery of such negotiable paper to innocent third persons. Equity also comes to the relief of the taxpayer against the enforcement and execution of illegal contracts or debts that create a charge in the way of debt against his property. For the above reasons, as well as irreparable injury, fraud or misconduct on the part of the public officers issuing or attempting to issue invalid bonds, or to dispose of an irregular issue of bonds, equity will aid a taxpayer and restrain the bonds or decree their surrender in the hands of other persons taking them with knowledge, or charged with knowledge, of their infirmities.²

In order to obtain the aid of a court of equity it is not necessary to allege or prove special damages to the complainant.³

§ 157. **Position of the Federal court.**—The position of the United States courts in the matter of restraining

¹ Osborne v. U. S. Board, 9 Wheat. 845; Delafield v. State of Illinois, (N. Y.) 26 Wend. 192.

² Avery v. Job, 36 P. R. 293; Fingal v. Burgess, 29 Atl. R. 641; Bradley v. Gilbert, 46 Ill. App. 623; Mauslin v. Council, 33 S. C. 1; Valparaiso v. Gardner, 97 Ind. 1; Railway Co. v. Dunn, 51 Ala. 178; Howell v. Peoria, 90 Ill. 105; Meyer v. Railway Co., 52 Mo. 81; Richmond v. Crenshaw, 76 Va. 936;

Hospers v. Wyatt, 63 Iowa, 936; Page v. Allen, 58 Pa. 338; Boyle v. New Orleans, 23 Fed. Rep. 843; Am. & Eng. Ency. Law, 1129, 1140, 1177; High on Injunctions, 1236, 1240; People v. Haines, 47 N. Y. 772; State v. Saline Co., 5 Mo. 350; Mayor etc. of Baltimore v. Gill, 31 Md. 375.

³ Tate v. Parkland, (Ky.) 13 S. W. R. 413.

the illegal issue of bonds is ably set forth in the case of *Crompton v. Zabriskie*, 101 U. S. 601.

Mr. Justice Field, in delivering the opinion of the court, said :

“To the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property-holders of the county, may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State courts in numerous cases ; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irreparable injuries, it would seem eminently proper for courts of equity to interfere, upon the application of a wrong, when the officers of these corporations assume, in excess of their powers, to create burdens upon property-holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate power. The courts may be trusted to prevent the abuse of their process in such cases.”

§ 158. **All State courts afford relief.**—It is not the object of this work to enlarge upon the nature of the suit to be brought by the taxpayer in the various States to restrain the issue of illegal, or an excessive issue of, bonds ; it is sufficient to say that such an action will lie in all the States, and that a taxpayer of the municipality, one who is, or will be, affected by such an issue of bonds, has the right to bring an action in his own name to prevent their issue and to call in question the action of the municipality authorizing the same with the view of annulling their proceedings and restraining the sale and delivery of the bonds to innocent purchasers.¹

¹ *Maudlin v. City of Greenville*, 114 Ind. 13 S. W. Rep. 443 ; *People v.* 11 S. W. Rep. 434 ; *Tate v. Parke*—*Haines*, 45 N. Y. 772 ; *State v. Sa-*

Bonds illegally issued may, by a bill in equity filed by a taxpayer, be directed to be cancelled, provided the suit be brought for that purpose within a reasonable time,¹ and provided further they contain no recital which in the hands of a *bona fide* holder will estop the town from pleading the illegality as a defence.

And where such bonds are in the hands of the original holders, with notice, the municipality may compel their surrender, and when the bonds are void because of want of power, the corporation or any taxpayer may compel their surrender for cancellation no matter who holds them.²

§ 159. **When tax may be restrained.**—When the bonds are void for want of power to issue them, or they were issued without the performance of some prior condition, as an election, or provision for the payment of the interest or principal as it falls due, or if issued in excess of a statutory or constitutional limitation, and the bonds do not contain recitals which will estop the municipality from setting up the non-performance of such prior conditions, or the excessive issue, or it is not otherwise estopped, the municipality or any officer thereof may be restrained from levying a tax to pay such bonds, or if the tax is levied, from paying over to the bondholders the interest or principal.³

And in cases of this kind the collector of taxes may refuse to pay the interest or principal of such bonds as it accrues,⁴ unless the statutes make it his duty in express terms to pay the money, in which case he must pay the money and cannot sit in judgment, as the question of the validity of the bonds can be tested in other modes.⁵

A much stronger case is required to enjoin the collec-

line Co., 51 Mo. 350; Mayor of Baltimore v. Gill, 31 Md. 375.

¹ Town of Mentz v. Cook, 108 N. Y. 504; Metzger v. R. R. Co., 79 N. Y. 171.

² On this subject see Dill. on Mun. Corp. Vol. 2. (4th ed.), § 119 *et seq.*; Pomeroy on Eq. Juris. 259-270.

³ State v. Bergen, 34 N. J. L. 438; Vanover Justices, 27 Ga. 354; Howard v. Levee Co., 51 Ill. 430; R. R. Co. v. Blanchard, 51 Ill. 240; Rice v. Smith, 9 Iowa. 570.

⁴ People v. Mead, 36 N. Y. 221.

⁵ Houston v. People, 55 Ill. 398; Martin v. Brown, 55 N. Y. 180.

tion of taxes levied for the payment of interest or principal of bonds issued on apparent authority, and which have passed into the hands of a *bona fide* holder, than to prevent the issue of such bonds on specified grounds which might have restrained their issue.¹ And the right to object may be lost by acquiescence, as if a taxpayer stand by and permit bonds to be issued and interest paid on them, he, rather than the innocent holder, should bear the loss.²

§ 160. **Action to compel issue and delivery of bonds.**—*Mandamus* is the proper remedy to compel the issue of bonds or other duties which municipal or State officers should perform in relation to their issue.

Under the laws of New York the comptroller of the city of New York is compelled to issue and negotiate revenue bonds, and out of the money arising therefrom to pay the city's and county's share of the State tax. The court, in *People v. Meyers*,³ affirmed the judgment below awarding a peremptory *mandamus* to compel the issue and sale of such bonds with interest from the time the tax should have been paid.

Mandamus will issue to compel the issue of bonds, or the submission of the question of their issue to the voters, by the legislative body of the municipal corporation, when the proceeds of the bonds are to be expended by some other body or commission for a public work.⁴

And in such cases the latter body or commission usually have authority to determine the amount of bonds to be issued for the public work under their charge.

And where a city contracts to execute and deliver, having power so to do, its bonds for a particular purpose, *mandamus* will issue to the city council and the mayor to carry out their contract and issue and deliver the bonds.⁵ And a municipality itself may, by *mandamus*,

¹ *Cook v. City of Beatrice*, (Neb.) 1795, 796, 809; Dill. on Mun. Corp., 48 N. W. Rep. 828.

§§ 519, 547, 548.

² *Moulton v. Evansville*, 25 Fed. Rep. 382; *Calham v. Millard*, 121

2 138 N. Y. 590.

³ *People ex rel. Prettyman v. N. Y. 69*; *Menard v. Hood*, 68 Ill. Board of Sup., 45 Ill. 162.

121. See High on Injunctions, 783;

⁵ *Smalley v. Yates*, 36 Kan. 519.

compel a State officer whose duty it is to certify or endorse its bonds so to do, and in such a case it has been held that the municipality was afterwards estopped to deny their validity.¹ A writ of *mandamus* will issue to enforce a lawful subscription for stock and the issuance of the bonds to pay for the same if the municipal corporation refuse to subscribe or issue when the railroad is entitled to the bonds.²

When it appears that there is a valid reason why the bonds should not issue, as if there is doubt whether the proper vote was taken, or proper notice of election given, or some other prior conditions have not been performed by the municipal officers, the court will refuse to grant the writ.³

And when a railroad is constructed on a different route than that designated in the proposition, or the company fail to perform some condition imposed upon it to be performed before aid is given, or does not complete the road within the time designated, *mandamus* will not issue to compel the delivery of the bonds.⁴

The *mandamus* to compel the issue of bonds must be directed to the body having the authority to do so.⁵

§ 161. **Actions on bonds and coupons.**—As the bonds and coupons when negotiable pass by delivery and are each separate promises to pay, the holder of either may sue on them in his own name, and need not, when the suit is on the coupon, join the holder of the bond or produce it in evidence,⁶ and such a suit may be maintained notwithstanding the bond has already been paid and surrendered.⁷ When the coupons do not contain any promise to pay, the decisions of the courts are divided as to the right of the holder to sue and recover on them in his own name.

¹ State v. Wilkinson, 20 Neb. 610.

² *Ex parte* Selma R. R. Co., 45 Ala. 696.

³ State v. Harris, 92 Mo. 29; State v. Sullivan, 15 West, 255.

⁴ State v. City of Morristown, 24 S. W. Rep. 13; Echols v. City of Bristol, 17 S. E. Rep. 943; McManus v. Duluth R. Co., 52 N. W. R. 980.

⁵ U. S. v. Board of Liquidation etc. of New Orleans, 69 Fed. Rep. 387.

⁶ Com'rs of Knox Co. v. Aspinwall, 21 How. 54; Walnut v. Wade, 103 U. S. 695.

⁷ Nat. Ex. Bank v. Hartford, 8 R. I. 375.

Some of the courts hold that he may,¹ but the weight of the decision is to the effect that such coupons can only be enforced by the holder of the bonds which contain the promise.²

§ 162. **Pleading.**—It is not proposed to endeavor to give the form of pleadings of the various States in a suit to recover on bonds or coupons, but to give a brief reference of what the pleadings should contain in the action.³

¹ Daniels on Neg. Inst., §§ 1511-12.

² Jackson v. York R. Co., 48 Me. 117; Crosby v. New London etc. R. 26 Conn. 121; *Evertson v. Nat. Bank*, 66 N. Y. 14.

³ Mr. Justice Clifford in *Riggs v. Johnson Co.*, 6 Wall. 166, 209, in alluding to the forms of writs and processes and pleadings in the Federal court said :

" Before proceeding to consider the operation and effect of the injunction issued by the State court, it becomes necessary to examine more closely into the source, nature and operation of the Federal process, and the jurisdiction and power of the Circuit Courts in the several States. Circuit Courts were created by the act of Congress, under which the judicial system of the United States was organized, but the act made no provision for the forms of process. Forms of processes in the Federal courts were regulated by the act of Congress, which was passed five days later.

" Writs and processes issuing from a Circuit Court were required by that act to bear the test of the Chief Justice of the Supreme Court, to be under the seal of the court, and to be signed by the clerk. By the second section of the act it was provided that the form of writs and executions . . . and the modes of process, in suits at common law . . . should be the same that were

then used in the Supreme Courts of the States. Subsequent acts adopted substantially those provisions, and made them permanent. Legal effect of those enactments was, that Congress adopted the form of writs and executions, and the modes of process, as then known and understood in the courts of the States, for use in the several Circuit Courts.

" Modes of process, and forms of process, were in use in the States at that period, other than such as were known at common law as understood in the English courts. Radical changes had been made in some of the States, not only in the forms of mesne process and the rules of pleading, but in the modes of process in enforcing judgment, as was well known to Congress when the Judiciary and Process acts were passed.

" Executions, it is admitted, may be issued by the Circuit Court, but the power of such courts to issue the other writs necessary to the exercise of jurisdiction is equally clear with the single restriction that the writ and the mode of process must be agreeable to the principle and usages of law. Usages of law, and not of the common law, it will be observed are the words of the provision, which, doubtless, refers to the principles and usages of law as known in the State courts at the date of that enactment.

" Forms of process, mesne and

The pleadings in a suit on coupons, if they contain no promise to pay themselves, should expressly show that the

final, and the modes of process varied in essential particulars from the principles and usages of the common law, and in many cases they were different in the different States.

“Intention of Congress in passing the Process Acts was, that the forms of writs and executions and the modes of process and proceedings in common-law suits, in the several Circuit Courts, should be the same as they were at the time in the courts of the respective States. Instead of framing the forms of process, and prescribing the modes of process, Congress adopted those already prepared and in use in the respective States, not as State regulations, but as the rules and regulations prescribed by Congress for use in the several Circuit Courts. Adopted as they were by an act of Congress, they became the permanent forms and modes of proceeding and continue in force wholly unaffected by any subsequent State legislation. Alterations can only be made by Congress, or by the Federal courts acting under the authority of an act of Congress.

“Practical effect of the course pursued was that the forms of writs and executions and the modes of process and proceedings were the same, whether the litigation was in a State court or in the Circuit Court of the United States. They were not always the same in different States nor in different circuits: and in some instances they were widely different in States of the same circuit. Those diversities or many of them continue to the present time. Great diversity in the form of real actions and of in-

dictments were the necessary effects of the system. Different rules of pleading necessarily followed. Modes of process also were different both in respect to mesne and final process. Attachment of personal and real property upon mesne process is allowed in one district even in the same circuit.

“Lands of the debtor were subject to seizure and sale on execution in one district, while in another real property was only subject to seizure and an extent corresponding to a modified *elegit* as at common law. Money judgments in one district became a lien upon the lands of a judgment debtor, while in another the judgment creditor must first seize the lands before he was entitled to any such preference.

“Remedies on the judgments against municipal corporations partook of the same diversity in the different districts as that appearing in the modes of process to enforce judgments recovered against private persons. Judgment against such a corporation might be enforced in one district by levying the execution, as issued against the corporation upon the private property, personal or real, of any inhabitant of the municipality, while in another the appropriate remedy in case the execution against the corporation was returned *nulla bona* was *mandamus* to compel the proper officers of the corporation to assess a tax for the payment of the judgment.

“Circuit Courts, by virtue of those acts of Congress, became armed with the same forms of writs and executions and vested with the authority to employ the same modes of process, as those in use

bonds from which the coupons are detached contain such promise and profert should be made of the bonds.¹ The coupons in a suit should be identified in the pleadings by a statement of the number of the bond and the date and sum and time of payment.²

The coupons, being notes or drafts unsealed, may be admitted in evidence and declared upon under the common money counts.³ Several coupons may be declared upon in a single count and be distinguished by referring to the numbers of the bonds from which they were detached.⁴

In a suit on the coupons the legislative authority for their issuance should appear, either by averment of the act conferring the authority or by setting out the recital in the bond relative thereto, and the relation of the coupons to the particular bonds to which they were originally attached should appear by way of inducement or recital stating the number of the bond, date, sum, etc.,⁵ but the vote or election provided as preliminary to the issue of the bonds and coupons need not be set out.⁶

But in other cases it has been held that where the officers were to issue the bonds after consent in writing of a certain proportion of the inhabitants had been obtained, it must be shown in the pleadings that such assent was obtained before the bonds were issued.⁷

in the State courts. Permanent effect of that wise measure was that the forms of writs and executions and the modes of process were the same, whether the litigation was in the forms of the State or in the Circuit Court of the United States.

"Remark should be made that those Process Acts in terms apply only to the old States, but the Federal courts in States since admitted into the Union are, in virtue of subsequent enactments, governed by regulations substantially similar.

"Express provision in the third section of the act of the nineteenth of May, 1828, is, that writs of execution and other final process issued

on judgments rendered in the Federal courts, and the proceedings thereupon shall be the same in each State as are now used in the courts of such State."

¹ *Crosby v. New London R. R. Co.*, 26 Conn. 121; *Jones on R. R. Securities*, 338.

² *Kenard v. Cass Co.*, 3 Dill. C. C. 147.

³ *Mercer Co. v. Hubbard*, 45 Ill. 142.

⁴ *New London Bank v. Ware R. R. Co.*, 41 Conn. 542.

⁵ *City v. Lamson*, 9 Wall. 477.

⁶ *Underhill v. Trustees*, 17 Cal. 172; *Brown v. Town of Pt. Pleasant*, 15 N. E. R. 209.

⁷ *Morrison v. Benards*, 36 N. J.

And when the statute requires that the bonds shall be registered and certified, or endorsed by a public officer, the pleadings must show that this was done.¹

But if the statutes or constitution does not provide that, unless the bonds are so registered or endorsed, they shall be void, then it is unnecessary to set forth the fact of such registration or endorsement.²

The pleadings need not show that certain duties required to be done by the municipal officers after the issue of the bonds had been performed, as the non-performance of such duties do not affect the validity of the obligations previously issued.³

The pleadings must show the authority of the officers to execute the instrument, either by the averments setting out the enabling statute or by an annexed copy of the bond which contains a recital of the act.⁴

The appointment of the officers and that their signatures are genuine, and whatever the enabling statute requires to be done, and provides that if not done the bonds shall be invalid, must be shown to have been done in the pleadings, and they must show that the bonds were issued for the purpose authorized.⁵

An averment in the pleadings that the bonds were issued by the municipal corporation is proper, because the officers issuing the bonds are the agents of the corporation.⁶

The plaintiff need not aver that the bonds were issued within the debt limitation, because if they exceed it, that fact is a matter of defence to be shown by the corporation.⁷

L. 219; *Cotton v. New Providence*, 47 N. J. L. 401.

¹ *Morrison v. Benards*, 36 N. J. L. 219.

² *Cotton v. New Providence*, 47 N. J. L. 401-6.

³ *Rahway Sav. Inst. v. Rahway*, 53 N. J. L. 48.

⁴ *Hopper v. Covington*, 118 U. S. 148.

⁵ *Kennard v. Cass Co.*, 3 Dill. C.

C. R. 147; *Nashville v. Ray*, 19 Wall. 468.

⁶ *Rahway Sav. Inst. v. Rahway*, 53 N. J. L. 48.

⁷ *Brown v. Town of Point Pleasant*, 15 S. E. R. (N. Y.) 209.

See *Kennard v. Cass Co.*, 3 Dill. C. C. R. 147, and cases cited as to the manner of declaring on bonds and coupons.

The declaration where the suit is on a bond issued by a municipal corporation which has no general power to issue commercial paper must show, either by averment or in the copy of the bond annexed, that the defendant had power to issue it. The special power must be shown, it is not sufficient to allege generally that it had full power to execute the bond.¹

It is held that in an action upon a negotiable bond issued by a town authorized by public laws to issue such bonds for certain purposes only, a declaration alleging that the defendant is a municipal corporation existing under the laws of the State, with full power and authority pursuant to those laws to execute negotiable commercial paper, and that pursuant to those laws it executed the bond sued on without showing for what purpose the bond was made, is bad on demurrer.²

In some of the States the law requires that claims against a municipal corporation shall be first presented to a board or officer for allowance and approval, and until this is done suit cannot be brought thereon. These statutes are usually held to apply only to unliquidated claims and accounts.³

The court, in *Green Co. v. Daniel*, 102 U. S. 187, held that the declaration on coupons and bonds of a county was not defective because it did not allege that they had been presented before the action was commenced, for auditing and approval. The court said: "The claim was, to all intents and purposes, audited by the court when the bonds were issued. The validity and the amount of the liability were then definitely fixed, and warrants on the treasury given payable at a future day."

In *Breckenridge County v. McCracken*, 61 Fed. Rep. 191, the petition to enforce the bonds stated that "an election was duly held." The court said:

"This is substantially an averment that the election was held according to law. It was not, however, impor-

¹ *Hopper v. Covington*, 118 U. S. 148.

² *Hopper v. Covington*, 118 U. S. 148.

³ *Vincent v. Lincoln Co.*, 62 Fed. Rep. 705.

tant that the pleader should aver the preliminary facts requisite to the exercise of the power granted by the Legislature to subscribe for the stock and issue bonds in payment. . . . If there was any defect in the preliminary steps to the exercise of that power, it is for the defendant to plead and show such irregularity. The performance or non-performance of acts requisite to the valid exercise of the power are matters of defence."

The defence may plead any matter which shows the bonds to be void in the hands of the plaintiff, as want of power or non-performance of precedent conditions, and that the plaintiff is not a *bona fide* holder, *non est factum* and the like."¹

§ 163. **Burden of proof—Presumption.**—When the bonds contain recitals that they are issued pursuant to an enabling act which is recited, and the act is constitutional, and they are in the hands of a *bona fide* holder, and it is sought to avoid the bonds by showing they were is-

¹ See § 124, 191, 192. Under the plea of *non est factum*, the United States Supreme Court (Montclair v. Ramsdell, 107 U. S. 147) has held that it was not competent to prove either fraud or illegality in the inception of the bonds, and compel the plaintiff to prove that he paid value for them, and that the refusal of the court below to instruct the jury, that "if the evidence satisfied the jury that there were circumstances of fraud or illegality in the inception of the bonds, or in the circumstances under which they were issued and disposed of by the commissioners, then the plaintiff cannot recover on the bonds without some proof that he purchased them for value or gave some consideration for them," was proper. The court said: "If any previous holder of the bonds in suit was a *bona fide* holder the plaintiff, without showing that he had himself paid value, could avail

himself of the position of such previous holder." The court also said: "The plea of *non est factum* did not put in issue the fact that he was the holder." Of the plaintiff the court said:

"It was not necessary that he should, in the first instance, prove either that he paid value or that the conditions preliminary to the exercise by the commissioners of the authority conferred by statute were, in fact, performed before the bonds were issued. The one was presumed from the possession of the bonds; and the other was established by the statute authorizing an issue of the bonds, and by proof of the due appointment of the commissioners and their execution of the bonds, with recitals of compliance with the statute. So we have often ruled in numerous cases with which the profession are familiar, and which need not be cited."

sued in excess of the statutory limitation, the burden of proof is upon the municipal corporation to show that the holder had knowledge of the over-issue.¹

When railroad bonds are issued contrary to an amendment to a constitution the burden of proof is upon the holder to show that they were issued pursuant to an enabling statute which continued the right to issue the bonds after the adoption of the constitution.²

In an action on coupons the fact that the plaintiff is the holder of the coupons and they are payable to bearer is sufficient evidence of ownership, and casts the burden of disproving ownership on the corporation.³

Title and possession are one and inseparable to clothe the instrument with the *prima facie* presumption that the holder paid value for it and received it in the usual course of business before maturity and without notice of prior equities, and the burden to prove otherwise is upon the defendant.⁴

The defendant may give evidence to show that the consideration is illegal, that the bond was fraudulently issued, or that the conditions precedent were not performed, or that it has been lost or stolen before the plaintiff received it, and if he proves such a defence the burden is then shifted on the plaintiff to prove that he is a *bona fide* holder.⁵

After the burden of proof is shifted upon the plaintiff, the court, after hearing all the evidence of the plaintiff to show himself to be a *bona fide* holder, if it is satisfied, conceding all the inferences which the jury could justifiably draw from the testimony, that the evidence was not sufficient to warrant a particular verdict, may so instruct the jury.⁶ Although it will not be im-

¹ Coler v. Sante Fe Co., 27 Pac. 110; Bank of Pittsburgh v. Neal, 22 R. 619.

² Choiser v. People, 36 Am. & Eng. Corp. Cas. 608; Samson v. People, 30 N. E. R. 781. See, however, Hutchinson v. Self, 153 Ill. 512.

³ Memphis v. Bethel, 17 S. W. 191.

⁴ Murray v. Lardner, 2 Wall. U. S. 261.

⁵ Com'rs v. Clarke, 94 U. S. 278; Cromwell v. Sac Co., 96 Ib. 51; Steward v. Lansing, 104 U. S. 505.

⁶ Railroad Co. v. Fraloff, 100 U. S. 24; Oscanogon v. Arms Co., 103 U. S. 261.

proper for the court to leave the case to the jury on the evidence.¹

§ 164. **Proof necessary for prima facie judgment.**—In a suit on bonds issued pursuant to a statute referred to in the bonds, the utmost a holder need do to entitle him to a *prima facie* judgment is to prove the signatures to the bonds and establish the fact that the officers signing the same were in fact such officers at the date of signing, and when the bonds are executed by the commissioners it is not necessary that he should prove that the conditions preliminary to the exercise by the commissioners of the authority conferred on them were in fact performed before the bonds were issued.

The possession of the bonds is *prima facie* evidence of the fact that he is a *bona fide* holder of them for value, and the recitals in the bonds of the statute, the proof of the appointment of commissioners and of their signatures, is like evidence that the preliminaries have been complied with.²

§ 165. **Mode of enforcing payment of municipal paper—Judgment usually first necessary.**—Usually, before the court will lend its aid to compel a municipal corporation to pay its outstanding matured paper, it is necessary that a judgment be first obtained which establishes the fact that the city is indebted to the plaintiff and determines the amount of such debt, after which the courts will issue a writ of *mandamus* to compel the payment of the judgment; but it is held in most of the State courts that a prior judgment is not always necessary to obtain a *mandamus*, and that a writ will issue without first obtaining a judgment, in all cases where it is made the duty of the municipality to levy or collect a special tax to pay a certain class of debts, and there is no valid defence alleged or claimed, and the power to tax is not doubtful.³

¹ *Steward v. Lansing*, 104 U. S. 505.

² *Bernards v. Morrison*, 133 U. S. 533; *Cotton v. New Providence*, 47 N. J. L. 401.

³ *State v. Davenport*, 12 Iowa, 335; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496; *Flagg v. Palmyra*, 33 Mo. 440; *People v. Brown*, 55 N. Y. 180; *Cumberland Co. v.*

The holder of the unpaid bonds or coupons must, however, make a demand on the proper officers to pay the bonds or coupons or to levy a tax to pay the same before he can apply for the writ.

And the demand and refusal must be alleged in the petition for the writ.¹

In the Federal courts the writ will not issue until a judgment be first obtained.²

After the creditor has obtained a judgment against a municipal corporation he is without remedy to enforce it in the usual mode were the judgment against a private person or corporation by the issue of an execution and the levy and sale of the debtor's property, because the property of a municipal corporation cannot be taken in execution and sold, and the judgment does not attach to such property.³ Nor can the revenues of a municipality, in the hands of its officers, be seized or taken to satisfy such a judgment.⁴

It has been held, however, in a few cases, that property of the corporation not held or used by it for any public purpose or held in trust may be taken in execution.⁵

And in the New England States it is held in a number of cases that the creditor of the corporation can take in execution, to satisfy his judgment against the town, the private property of its citizens.⁶

§ 166. **Mandamus the proper remedy.**—*Mandamus* is the proper, and would seem to be the only, remedy by means of which a judgment recovered against a munic-

Randolph, (Va.) 16 S. E. Rep. 722; ² Green Co. v. Daniel, 102 U. S. Riley v. Garfield Tp., 51 Kan. 187; Osborne v. Adams Co., 7 Fed. 163; Thomas v. Mason, 39 W. Va. Rep. 411.
526.

¹ State v. Jacksonville, 22 Fla. 21; People v. Town of Mt. Morris, (Ill.) 27 N. E. R. 757. As to what ³ Chicago v. Halsey, 25 Ill. 595; Darlington v. Mayor etc., 31 N. Y. 161.

a relator who is holder of bonds or ⁴ Trubell v. Colburn, 64 Ill. 376; Klien v. New Orleans, 99 U. S. 119; Erie v. Knapp, 29 Pa. St. 173.

to obtain a *mandamus* to compel the ⁵ Brown v. Gates, 15 W. Va. 131; levy of a tax to pay them, see Davenport v. Peoria Ins. Co., 17 Commonwealth v. Pittsburgh, 34 Iowa, 276.

Pa. St. 496. ⁶ Beardsley v. Smith, 16 Conn. 368.

ipal corporation can be collected, except in those States where the statute has provided other means of enforcing payment.¹

According to the well established principles and usage of the common law, the writ of *mandamus* is a remedy to compel any person, corporation, public functionary or tribunal to perform some duty required by law, where the party seeking the relief has no other remedy, and the duty sought to be enforced is clear and indisputable.²

When a creditor obtains a judgment against the municipal corporation he is entitled to have the whole power of the corporation put in motion to obtain means to pay his claim.³

Peremptory *mandamus* may issue to compel a city treasurer to pay over interest money in city bonds, although the money in his hands may have been appropriated by the city council to other purposes, provided the amount thus withdrawn from the treasury is not absolutely needed for the ordinary expenses of the city.⁴

When the power to levy a special tax is permissible in form, and the council may levy it if it is deemed advis-

¹ *Rees v. Watertown*, 19 Wall. 107; Dill. on Mun. Corp. (4th ed.) § 849.

² Mr. Justice Grier, in *Knox Co. v. Aspinwall*, 24 How. 376.

Mr. Justice Grier, in the last case, said: "Even assuming that a general law of Indiana permits the public property of the county to be levied on and sold for the ordinary indebtedness of the county, it is clear that the bonds and coupons issued under the special provisions of this act were not left to this uncertain and insufficient remedy. The act provides a special fund for the payment of these obligations, on the faith and credit of which they were negotiated.

"It is especially incorporated into the contract that this corporation shall assess a tax for the special purpose of paying the interest on these coupons. If the commissioners either neglect or refuse to perform this plain duty, imposed on them by law, the only remedy which the injured party can have for such refusal or neglect is the writ of *mandamus*."

"Why should not the Circuit Court of the United States be competent to give to suitor this only adequate remedy?"

³ *City of New Orleans v. United States*, 19 Fed. Rep. 40.

⁴ *Williamsport v. Com'rs*, 90 Pa. St. 498.

able, it is held in such cases that the court, by a *mandamus*, can compel the levy of the special tax, and the language, although permissive in form in such cases, is deemed to be peremptory.¹

In the Federal courts a *mandamus* when issued cannot be interfered with by the State courts,² and under such

¹ *Memphis v. Brown*, 97 U. S. 320; *Supervisors v. United States*, 4 Wall. 135. In this last case there is a citation of cases.

² In *Riggs v. Johnson Co.*, 6 Wall. 166, where it appeared that railroad aid bonds were issued pursuant to a statute of Iowa, and afterwards the State court, reversing their former decisions, held such bonds invalid, and judgment was recovered against the county in the Circuit Court for the District of Iowa, the latter court refusing to follow the later decisions of the State court.

The State court at the suit of a taxpayer issued an injunction perpetually enjoining the corporation, defendants, from levying the special tax devoted to the payment of the bonds.

The defendants, the county, contended, among other defences, that the injunction of the State court prevented them from obeying a *mandamus* issued on the judgment and that the Federal courts had no power to issue a *mandamus* in view of the injunction.

The court by Clifford, J., among other things, said :

"Where a State has authorized a municipal corporation to contract and to exercise the local power of taxation to the extent necessary to meet the engagement, the power thus given cannot be withdrawn until the contract is satisfied.

"Regularity of proceedings in the primary suit are not open to

inquiry, and it is conceded that the judgment was in regular form ; and if so, then the power of the Circuit Court to issue final process, agreeably to the principles and usages of law, to enforce the judgment, is undeniable.

"Authority of the Circuit Courts to issue process of any kind which is necessary to the exercise of jurisdiction and agreeably to the principles and usages of law, is beyond question, and the power so conferred cannot be controlled either by the process of the State courts or by any act of a State Legislature. . . .

"Tested by all these considerations, our conclusion is, that the propositions of the defendants cannot be sustained, and that the Circuit Courts in the several States may issue the writ of *mandamus* in a proper case, where it is necessary to the exercise of their respective jurisdictions, agreeably to the principles and usages of law.

"Where such exigency arises they may issue it, but when so employed, it is neither a prerogative writ nor a new suit, in the jurisdictional sense. On the contrary, it is a proceeding ancillary to the judgment which gives the jurisdiction, and when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same as provided in the contract.

"Next suggestion of the defendants is, that if the writ is issued,

a *mandamus* the officers of municipal corporations may be compelled to perform their duty and levy and collect the taxes, whether general or special, necessary to pay the judgment, and in some cases where the State officers have refused to act the Federal courts have appointed United States marshals as commissioners for that purpose.¹

§ 167. **May the judgment be inquired into.**—Although the record of the judgment cannot be contradicted in *mandamus* proceedings,² yet it has been held that, on an application for *mandamus* to compel the levy of a tax to pay a judgment obtained on bonds, a municipal corporation may show in opposition thereto that the bonds are void, and were issued without power, and the court will take cognizance of the facts. The court, in *Brownsville Tax Dist. v Loague*, 129 U. S. 493-505, on this subject, said: "The power invoked (*mandamus*) is not the power to tax to pay judgments, but the power to tax to pay bonds, considered as distinct and independent, and therefore, when the relator is obliged to go behind his judgments, as money judgments merely, to obtain the remedy pertaining to the bonds, the court cannot decline to take cognizance of the fact that the bonds are utterly void and that no such remedy exists."

When a special tax is devoted to the payment of a cer-

and they should obey its commands, they may be exposed to a suit for damages or to attachment for contempt and imprisonment. No such apprehensions are entertained by the court, as all experience shows that the State courts at all times have readily acquiesced in the judgments of this court in all cases confided to its determination under the constitution and the laws of Congress. Guided by the experience of the past, our just expectations of the future are that the same just views will prevail. Should it be otherwise, however, the defendants will find the most

ample means of protection at hand. Proper course for them to pursue, in case they are sued for damages, is to plead the commands of the writ in bar of the suit, and if their defence is overruled, and judgment is rendered against them, a writ of error will lie to the judgment under the twenty-fifth section of the Judiciary Act."

¹ *Lees Co. Sup. v. Rogers*, 7 Wall. 175.

² *Harshman v. Knox Co.*, 122 U. S. 306. See also *Norton v. Taxing District of Brownsville*, 129 U. S. 479.

tain class of bonds, a recovery of a judgment on the bonds will not merge the indebtedness so as to destroy the classification or take from the bonds the right to the special tax, and *mandamus* will still lie to compel the levy of the special tax to pay the bonds.¹

§ 168. **Mandamus cannot enlarge power.**—The writ of *mandamus* confers no power upon those to whom it is directed. It merely compels them to perform the powers already conferred upon them,² therefore it is a good defence to a *mandamus* that the officer directed to perform the act required does not possess the legal authority to do so, nor can a *mandamus* compel an officer to violate the law of his own State,³ but an officer who refuses to obey a *mandamus*, when properly issued, may be punished for contempt,⁴ and is liable in damages for the non-performance of his duty. The damages, however, in such cases are but nominal.⁵

A court cannot, by *mandamus*, direct a common council to act beyond their charter, although it is well settled that the power to incur a debt involves the power to levy taxes, and it is not essential that the statute authorizing the issue of the bonds provide for such levy,⁶ yet if the *mandamus* direct the levy of taxes beyond the limit of taxation it will not be granted.⁷ And where the corporation has no power to issue the bonds it cannot be compelled by *mandamus* to levy a tax to pay them.⁸

When the limit of indebtedness is reached, it cannot be exceeded. If, however, a subsequent act authorizes the incurring of a debt, the power may be exercised, notwithstanding the limit. The subsequent act is con-

¹ East St. Louis v. Underwood, 105 Ill. 398; E. St. Louis v. U. S., 110 U. S. 231.

² United States v. Clark Co., 95 U. S. 769; Carroll Co. v. United States, 18 Wall. 71; Board of Com'rs. of Grand Co. v. King, 67 Fed. Rep. 202.

³ United States v. Knox Co., 2 McCrary C. C. 625.

⁴ Dow v. Humbert, 91 U. S. 291.

⁵ Newark Sav. Inst. v. Panhorst, 7 Biss. (U. S.) 99. The rule in New York is to allow the creditor the whole of his claim. Clark v. Miller, 54 N. Y. 528.

⁶ Wilson v. City Council of Florence, 19 S. E. Rep. 4.

⁷ United States v. Macon Co. Court, 35 Fed. Rep. 482; Goelet v. Elizabeth, 3 N. J. L. 49; Supervisors v. U. S., 18 Wall. 71.

⁸ U. S. v. Macon Co., 99 U. S. 582.

strued as enlarging the power of the corporation to incur the additional debt and *mandamus* will issue to compel the levy of a tax beyond the limit.¹

Where a judgment is recovered against a municipal corporation, the amount of which exceeds the constitutional taxing power, the court may issue a peremptory writ directing the city to levy the full amount of the tax it is authorized by charter to levy, and to pay on such judgment any surplus in any city fund remaining after the current expenses of the city for the fiscal year have been paid.²

Where there is a statutory limit to the rate of taxation, and by a subsequent act the municipality is authorized to issue bonds, and a special tax by said act is to be applied to their payment, the municipality can levy the special tax beyond the limit, but it cannot levy a tax beyond the original and special rate.³

Mandamus will not be issued to compel the county treasurer to pay interest coupons, taken from county bonds, out of any other than specific funds raised for that purpose, and in his hands, until the board of commissioners has issued an order upon him to do so, since the statutes provide that "all moneys received by him for the use of the county shall be paid by him only on a warrant of the board of commissioners, drawn according to law," and it will not be issued to compel the county treasurer to pay interest coupons taken from county bonds, when the answer of the treasurer contests the validity of the coupons, and their validity does not clearly appear.⁴

When the bonds and coupons are to be paid out of a special fund, or by special tax, then *mandamus* can only issue to compel the payment out of such funds or by such special tax, and if these prove insufficient *mandamus* will not lie to compel a general levy of taxes.⁵

¹ *Amey v. Allegheny City*, 24 How. 364.

² *Howard v. City of Huron*, 60 N. W. R. 803.

³ *U. S. v. County of Macon*, 99 U. S. 562.

⁴ *Bailey v. Lawrence Co.*, (S. D.) 51 N. W. R. 331.

⁵ *United States v. Macon Co.*, 99 U. S. 582.

It has been held that where a writ of *mandamus* has been granted to compel the township supervisors to assess taxes to pay bonds then due, and the assessment has been made, another writ will be granted to compel a further assessment to pay bonds which matured subsequently to the first writ, but not to compel an assessment to cover the uncollected portion of the first assessment, until the sale for delinquent taxes of the lands on which the first assessment was made.¹

Where the statute governing the payment of judgments against counties makes it optional with the county commissioners to pay either by the levy of a special tax, or by warrants drawn upon the county fund, and gives such commissioners discretion as to levying such tax, the county cannot be compelled by *mandamus* to pay a judgment against it by the levy of a tax.²

Where the statute authorizing the issue of bonds provided that they should be paid as far as possible from a certain revenue, and the balance should be paid by the common council out of taxes which the council was to raise, it was held that the common council could be compelled by *mandamus* to raise the balance of the money required.³ Where there is money in the treasury of a city subject to appropriation by the council for the payment of a judgment against such city, the holder of the judgment may, by *mandamus* against the council, compel its payment.⁴

§ 169. **What enters into the contract.**—The law, as it stood at the time of the making of the contract, enters into and forms a part of the contract itself. A city ordinance, in pursuance of which bonds are issued, providing for the payment of principal and interest, is a part of the contract between the city and the holder of the bonds.⁵ Where the enabling statute which authorized

¹ Board of Com'rs Grand Co. v. King, 67 Fed. Rep. 202.

⁴ State etc. v. Kansas City, 58 Mo. App. 124.

² United States v. Macon Co., 99 U. S. 582.

⁵ Bassett v. City of El Paso, (Tex.) 30 S. W. R. 893.

³ State v. Railway, 49 N. J. L. 384.

the issue of the bonds provided for a special tax to pay them, this tax enters into the contract, and the holder of the bonds is entitled to have this special tax continued or some other equally efficacious mode substituted to pay them.¹ The United States Court,² in a case where, by subsequent legislation, the State substituted another remedy which clogged and retarded the collection of the bonds and took away the special tax provided for in the enabling act, refused to recognize the subsequent act and held it unconstitutional, and issued a *mandamus* directing the levy of the special tax.

§ 170. **To whom writ should be directed.**—The writ of *mandamus* should be directed to the officers of the municipality who are authorized to levy the taxes under its charter, and although usually directed to the officers by name, yet in case of the resignation, death or expiration of office, the proceedings do not abate, but continue to their successors in office.³

In one case it was held that *mandamus* against a public officer did abate by his death, and could not be revived against his successor, but this ruling seems to have been based upon a peculiar statute.⁴

The writ must be directed to all those, if more than one, whose duty it will be to execute the writ.

The writ should be directed to the officers in their official names, and to the officers in their proper capacity, and be served upon those who are to make the return.⁵

The alternative writ is in the nature of a declaration, and must allege, in issuable form, all facts necessary to show the relator entitled to the relief he seeks against the identical person from whom relief is sought.⁶

It is sufficient in the alternative writ to describe the officers in their official capacities, and when the peremptory writ is granted they may then be named. Where the legislative body is named in the peremptory writ, that

¹ See §§ 185, 186, 187.

² Siebert v. Lewis, 122 U. S. 284.

³ Souther v. Madison, 15 Wis. 30.
Dill. on Mun. Corp. (4th ed.) §§ 861 b.
884.

⁴ United States v. Boutwell, 17 Wall. 604.

⁵ Dill. on Mun. Corp. §§ 874-75
and cases cited.

⁶ State v. Bolche, 89 Mo. 188.

is held to be sufficient, and a service on its clerk a proper service.¹

When the money to pay the judgment is collected and in the hands of an officer then the writ should be directed to him.²

§ 171. **Equity will not assist.**—A court of equity will not lend its aid to collect the judgment. The case of *Rees v. Watertown*, 19 Wall. 107, is a case illustrating the point. In that case it appeared the officers had resigned, and there was no existing legal corporate authority which could be compelled to levy a tax. It was sought by a bill in equity to have the property of the municipality subjected to the payment of the trust debt with which it was claimed the property was encumbered. The court refused the equitable relief demanded, and held that the remedy was at law by *mandamus* and said: "The remedy is in law and theory perfect and adequate; the difficulty is in its execution only, the want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding." This case was affirmed in *Heine v. Levee Commissioners*, 19 Wall. 655, where the court further said: "So far as the present case is concerned the State has delegated the power of taxation to the levee commissioners.

"If that body has ceased to exist the remedy is in the Legislature, either to assess the tax by a special tax or to vest the power in some other tribunal."³

§ 172. **Remedies against a State.**—When the bonds are issued by the State itself and it defaults in the payment of either the principal or interest, the citizens of the State or of any other State cannot bring suit in any court to enforce payment, unless the State has provided some

¹ *Board of Co. Com'rs v. Sellow*, 19 Albany L. J. 241.

² *Ray v. Wilson*, 10 So. R. 613.

As to proceedings on *Mandamus*, see Dill. on Mun. Corp. §§ 849 to 887; High on Extraordinary Remedies; Merrill on *Mandamus*; Beach

on Public Corporations, §§ 1599 to 1609.

³ On this subject see Dill. on Mun. Corp. (4th ed.) §§ 849 *et seq.*; Burroughs on Public Securities, p. 539 *et seq.*; Tiedman on Mun. Corp. §§ 375-376; Mechem on Public Officers, § 927 *et seq.*

redress, which most, if not all of them, have, and this redress will be found in either the acts of the Legislature or in the constitution itself of the State.¹

The mode of redress is usually to ascertain the amount due and to whom, and the Legislature then makes provision for the payment. No execution can issue, as the property of the State cannot be taken in execution.

Mandamus will not lie unless the moneys, out of which payment can legally be made, are in the hands of some State officer, and he refuses to make the payment.

§ 173. **Legislature may divide or dissolve municipal corporations.**—The Legislature has the power, unless restrained by the constitution, to alter the boundary lines of a municipality, by dividing the same into other municipalities, or by annexing other territory, or annexing the municipality itself to another, and even to dissolve the corporation itself and create another in its stead embracing the same, or more or less, territory under another corporate name. In all such cases the holder of the bonds and other evidence of debt of the original corporation is much interested.

It is the usual custom in such cases for the Legislature to make provision in the act which makes the change to ascertain and fix the proportion of the old debts the separated portions should become liable for; and when such provision is made, the findings of the body appointed to ascertain the amount of old debts each portion of the old corporation should be liable for, and the funds it should receive, is final, unless provision for an appeal to the courts is given.²

Where a municipality is divided, the old corporation

¹ By the eleventh amendment of the Federal constitution the States are prohibited from being sued in the Federal courts. This prohibition does not extend to suit where in a State is not a party to the record. It has been decided in a number of cases that the prohibition does not extend to counties or other subdivisions of a state.

Osborne v. Bank of the U. S., 9 Wheat. 738; *In re Ayres*, 123 U. S. 443. See also *Cowles v. Mercer Co.*, 7 Wall. 118.

² *Sedgwick Co. v. Bunker*, 16 Kan. 498; *Overseers of Norwich v. Overseers of Berlin*, 18 Johns. (N. Y.) 382.

will continue to hold all the corporate property within its limits and will be liable for all debts,¹ and if the old corporation is unable to pay, it has been held equity would compel payment by the new territory.²

When one corporation is annexed to another all the rights, property and interest of the annexed corporation becomes vested in the other, and the latter becomes, by such annexation, without legislation to that effect, liable for all the debts of the corporation annexed.³

As said in *New Orleans v. Clarke*, 95 U. S. 653, "The act which annexed Carrollton to New Orleans provided that all property, rights and interests of every kind of the former city should be vested in the latter, and that the debts and liabilities of Carrollton, including the funding and improvement bonds, should be assumed and paid by the city of New Orleans, and that city was in terms declared liable therefor.

"*Independently of this legislation* the liabilities of Carrollton would have devolved with its property upon New Orleans, on the annexation to that city, so far, at least, that they could be enforced against the inhabitants and property brought by annexation within its jurisdiction."

§ 174. **New corporation liable for old debts.**—When a city is dissolved and a new corporation created in its place which practically embraces all the property of the old, it is held that the new corporation is liable for the debts of the old corporation.⁴

¹ *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149; *Mount Pleasant v. Beckwith*, 109 U. S. 511.

² *Brewis v. Duluth*, 3 McCrary (17, S.) 219.

³ *Bates v. Gregory*, 26 Pac. Rep. 891.

⁴ In *Meyer v. Brown*, 65 Cal. 583, on an application for *mandamus* to compel the levy of a tax to pay bonds, the bonds in suit were issued pursuant to an act of Califor-

nia, April 24, 1858, which provided for the consolidation of the city and county of Sacramento and provided for "liquidating, funding and paying" the outstanding debts of the old city government by the issuance of negotiable bonds, to pay which the act provided that a sinking fund should be created and 55 per cent of the revenue was to be set apart for that purpose. The court held that the surrender of the old debt and the acceptance of the

The Legislatures of several of the States have attempted to relieve over-burdened cities from the payment of the debts by dissolving the old corporation and creating in its stead, out of practically the same territory, another which it was supposed could not be compelled to pay the debts of the former corporation, but the courts have held the new corporation liable for the old debts.¹

In *Hill v. Kahoka*, 35 Fed. Rep. 32, it appeared that the town of Kahoka was, in 1867, duly incorporated under a general law of Missouri, and among other acts had issued some railroad aid bonds. Its charter was forfeited in 1886 on proceedings by *quo warranto*, and the city of Kahoka was incorporated, embracing practically the same territory and population. Suit was instituted against the new corporation upon some of the coupons annexed to said bonds and judgment was rendered against the city. The court said :

“Municipal corporations cannot extinguish their debts by changing their names or organizing under new charters. A debt once contracted by a municipal corporation will survive as a debt against whatever corporate entity is subsequently created to take its place and exercise its power of local government over substantially the same people and territory.”

§ 175. **Rights of creditors.**—Where a corporation is legislated out of existence and its territory is annexed to another, or other similar corporation or corporations, it has been held that a creditor of the old corporation could file a bill in equity to compel each of the corporations, to which parts of the old corporation were added, to pay to him the proportionate share of his debt, based upon the proportion of the value of the old corporation each corporation received by annexation.²

bonds created a contract which could not be impaired by subsequent legislation, and that *mandamus* would issue to compel the levy of the tax by the legal successors of the consolidated city and town.

Hill v. Kahoka, 35 Fed. Rep. 32 ;
Devereaux v. City of Brownsville,
29 Fed. Rep. 742 ; *Broughton v.*
Pensacola, 93 U. S. 206.

² *Mount Pleasant v. Beckwith*,
100 U. S. 514 ; *Beckwith v. Racine*.

¹ *Amy v. Selma*, 77 Ala. 103 ; 7 Biss. 142.

When a public corporation is abolished, and out of it several new ones are created, and the act does not provide for the ascertainment and division of the old debts, it has been held that each of the new corporations is liable for all the debts of the old one.¹ In which case it is presumed the one paying would be entitled to contribution from the others. And in New Jersey, where a statute divided a township between another township and a city, and directed that the debts of the old township should be paid by the other corporations, it was held that the creditors of the old township could sue the city or the township to which the old township was annexed.²

§ 176. **When debtor powerless—When Legislature may act.**—It would seem that when a public corporation is dissolved by the Legislature, and no other formed in its stead, and there are no funds out of which to pay debts, except those raised by taxation, the creditor of the dissolved corporation is powerless to enforce his debt and is left without a remedy, unless it be to apply to the very body, the Legislature, which placed him in this unfortunate position.³

If no provision is made for an apportionment of the debts of a municipal corporation at the time it is divided or dissolved, the Legislature may, by a subsequent act, make the apportionment of the debts and of the funds, and when in the act consolidating two municipalities it provides that the property in each shall be liable only for the old debts of each, the Legislature may, by a subsequent act, provide that the rate of taxation shall be the same in the whole consolidated corporation, and that it shall be liable for all the debts of both old corporations.⁴

§ 177. **Statute of Limitations.**—The coupons are so connected with the bonds from which they are detached that they partake of the same contractual nature as the bonds and are governed by the same statute, notwith-

¹ Hughes v. School Dist., 72 Mo. 643.

² Neilson v. Newark, 49 N. J. L. 246.

³ See § 190.

⁴ Layton v. New Orleans, 12 La. 515. On this subject see Dillon on Mun Corp. §§ 63, 70, 187, 188, 189; Cooley on Const. Limit. 229-30; Beach on Pub. Corp. § 396 *et seq.*

standing the fact that if considered alone they would be of a different nature and be controlled by the statute in a different way as to the time of maturity. When the bond from which they are detached is a specialty, the coupons are to be likewise considered, but the statute begins to run against a detached coupon from the date of its maturity and not that of the bond from which it is detached.¹ And it also begins to run on the coupons from the time they respectively mature, although attached to the bond,² though it does not begin to run against the bond until its own maturity.

The coupons furnish separate causes of action which are complete at the maturity of the coupons, and it would be exceptional and unreasonable to hold that the statute should not then commence running, therefore actions on the coupons may be barred before action on the bonds maturing at a late date would become so.³

Although the bonds may contain a condition that, in case of default in the payment of the coupons, the bonds themselves may be declared due at the option of the holder, and he may then sue for both principal and interest, the statute does not commence running from the time of such default because of such condition.⁴

It is held that when a suit cannot be brought for the interest on the coupon because barred by the statute, it cannot be recovered by suing for interest on the bond.⁵ Where a statute providing that the holders of claims against a city, due before a certain time, might present them for refunding, did not limit the time when such claims should be presented, still, failure to present such claims, until they had become barred by limitation, would give the city the right to refuse to issue bonds for such barred claims.⁶ Where the Legislature, after the issue of bonds, creates a special fund out of which the in-

¹ Clark v. Iowa City, 20 Wall. 583.

² Amy v. Dubuque, 98 U. S. 470.

³ Clark v. Iowa City, 98 U. S., 20 Wall. 583.

⁴ Nebraska Bank v. Nebraska, etc. Co., 14 Fed. Rep. 763.

⁵ Griffin v. Macon, 36 Fed. Rep.

885.

⁶ Bates v. Gregory, 26 Pac. Rep. 891.

terest and principal is to be paid, and the bondholder presents his coupons or bonds for registration or payment in the manner provided, it has been held that the Statute of Limitations will not run against the coupons or bonds so presented, until the money is received in the treasury in accordance with the terms of the act.¹

§ 178. **New promise.**—A new promise to pay to be effectual and interrupt the running of the statute must be made by the officers of the corporation under authority of the board having control of the finances, and be made to the person holding the bonds or other evidence of city debt, or to some person acting for him.²

In the case of *City of Houston v. Jankonskie*, 13 S. W. R. 269, on a suit to recover on bonds barred by the statute, the holder of the bonds for the purpose of proving a new promise introduced in evidence the annual statements of the secretary of the city of Houston for the year 1885, in which the item under head of liabilities appeared, "M. Reichman, past due bonds, \$2,600," the bonds in suit were a part of the \$2,600 described, and a further statement of the secretary, "Approximate estimate of accrued interest on bonds . . . on \$2,600 Reichman bonds six years at ten per cent \$15,600," was introduced for same purpose. No evidence was introduced to show that the secretary had any authority to make any acknowledgment or promise that would bind the city. The court held that the actions of the official did not affect the city or constitute a new promise, and further, that such a publication was not a promise.

In an action on the coupons or the bonds, an offer by the municipal corporation to compromise its bonds made within the statutory period and which is declined by the holders of the bonds in suit, but accepted by the holders of like bonds, is not a promise to pay or an acknowledgment of the debt which will interrupt the running of the statute.³

¹ *Lincoln Co. v. Luning*, 133 U. S. 150; *McKinney v. Snyder*, 78 529; *Frehill v. Chamberlain*, 65 Penn. St. 497.
Cal. 603.

³ *Edwards v. Bates Co.*, 55 Fed.

² *Fort Scott v. Hickman*, 112 U. S. Rep. 473.

An offer to compromise unaccepted cannot be made the basis of a promise to pay, and cannot even be admitted in evidence.¹

§ 179. **When Federal courts follow the decisions of the State courts.**—The Federal courts have by a uniform course of decisions given stability to municipal bonds and have established the doctrine that such bonds, negotiable in form, in the hands of a *bona fide* holder, are valid notwithstanding irregularities in their issue, or even the non-performance of prior conditions, if the bonds contain proper recitals which allege that the bonds were legally issued, or the municipality has otherwise estopped itself, provided the municipal corporation had the power to issue them.

And this course of the Federal courts has been so uniformly in favor of compelling municipal corporations to pay their bonds when they had power to issue them, and they are in the hands of innocent holders, that a large part of the litigation relating to such bonds finds its way into these courts.

§ 180. **Latest statute decision followed—Exceptions.**—The Federal courts follow the latest decisions of the highest courts of a State, if the decisions are founded upon the construction of the State constitution or statute law of the State, or upon some peculiar custom,² provided the bonds or other municipal paper were issued after the decision of the State court of last resort; but when the municipal paper was issued after a decision of the State court of last resort had construed the law relating to the issue of the paper, and subsequently to its issue the same court reverses its former rulings and holds the bonds void, the Federal courts will not follow the last decision of the State courts.³

§ 181. **Case illustrating exception.**—The case often

¹ Cook v. Insurance Co., 70 Mo. 15.

U. S. 356; Town of South Ottawa v. Perkins, 94 U. S. 260.

² Sciopio v. Wright, 101 U. S.

³ Douglass v. County of Pike, 101

665; Burgess v. Seligman, 107 U. S.

U. S. 677; Taylor v. Ypsilanti, 105

20; Green Co. v. Conness, 109 U. S.

U. S. 60.

104; Anderson v. Santa Anna, 116

referred to illustrating this position of the Federal courts is that of *Gelpcke v. Dubuque*, 1 Wall. 175.

In this case it appeared the city of Dubuque had issued bonds to aid in the construction of two railroads extending beyond the limits of the city, and by a series of decisions extending between 1853 and 1859 the Supreme Court of Iowa had held that the Legislature of the State had the constitutional authority to empower municipal corporations to issue such bonds. The Supreme Court of Iowa, after said bonds had been issued and sold, in the case of *State of Iowa ex rel. v. The County of Wapello*, 13 Iowa 390, overruled, by an unanimous opinion, the former decisions of the same court, and held that such an act was unconstitutional and the very bonds under discussion void.

Justice Swayne, who delivered the opinion of the court, in holding the bonds to be valid and refusing to follow the last decision of the Iowa Supreme Court, said :

" It is urged that all these decisions (the earlier ones) have been overruled by the Supreme Court of the State in the later case of the *State of Iowa ex rel. v. The County of Wapello*, and it is insisted that in cases involving the construction of a State law or constitution, this court is bound to follow the latest adjudication of the highest courts of the State. *Leffingwell v. Warren*, 2 Black, 599, is relied upon as authority for the proposition. In that case this court said it would follow the latest settled adjudications.

" Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine. It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur.

" The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen States of the Union. Many of the cases in the other States are marked by the profoundest legal ability. . . . However we may regard the late case in Iowa affecting the future, it can have no effect upon the past. The sound and true rule is, that if the contract when

made was valid by the laws of the State as then expounded by all departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decision of its courts, altering the construction of the law.¹

“The same principle applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court.

“To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. . . . We shall never immolate truth, justice and the law, because a State tribunal has erected the altar and decreed the sacrifice.”

Justice Miller filed a very elaborate dissenting opinion.

§ 182. **When the Federal courts will not be controlled.**—The Federal courts upon questions of mercantile or commercial law or usages which are not peculiar to any place will not yield their judgment to that of the State courts or be controlled by them, unless they are in accord with the rulings of the Federal courts.²

In a case in Pennsylvania,³ where the court held municipal bonds, negotiable in form, to be non-negotiable, the United States Court refused to be controlled by the decisions of the Pennsylvania Court, because the question was one of commercial law, and the court held the bonds to be negotiable.⁴

This doctrine is further illustrated by the case of *Town of Venice v. Murdock*, 92 U. S. 494, in a suit to enforce bonds issued under a New York statute. It was, at the time of the decision, the uniform rule of the New York courts that, where the statute authorizing the issue of

¹ *The Ohio L. & T. Co. v. Debat*, 16 How. 432.

² *Olcott v. Supervisors*, 16 Wall. 678; *Talcott v. Town of Pine Grove*, 19 Wall. 666; *Com'rs Johnston Co. v. Thayer*, 94 U. S. 642.

³ *Dimon v. Lawrence Co.*, 37 Penn. 352.

⁴ *Mercer Co. v. Hackett*, 1 Wall. 93.

railroad aid bonds directed that the prior consent in writing of a certain percentage of the taxpayers should be obtained, and that the officers authorized to issue the bonds should make and file, attached to such consent, an affidavit that the persons so consenting were the required number of the taxpayers, such affidavit was but *prima facie* evidence of the facts contained therein and that the findings of such officers were not conclusive.¹

The Supreme Court of the United States in the above case held that the affidavit of such officers was conclusive, and that it was not bound to follow the New York case to the contrary.

The court said : " We are aware that in the State of New York it has been held adversely to the opinions we have expressed (citing the New York cases).

" It is argued, however, that the New York decisions are judicial constructions of the statute of that State, and that therefore they furnish a rule by which we must be guided.

" The argument would have force if the decisions in fact presented a clear case of statutory construction ; but they do not. They are not attempts at interpretation.

" They would apply as well to the execution of powers or authorities granted by private persons, as they do to the issue of bonds under the statute of April 16th, 1852. They assert general principles, to wit : that persons empowered to borrow money and give bonds therefor, for the purpose of paying it to an improvement company, are not authorized to deliver the bonds directly to the company, a doctrine denied in this court, in the Supreme Court of Pennsylvania, and even in the Court of Appeals of New York (*People v. Mead*, 24 N. Y. 124).

" They assert also that where an authority is given to an officer to execute and issue bonds on assent of two-thirds of the voters of a town, the assent to be obtained by the officer and filed in a public office, with an affidavit verifying the assent, the verification amounts to nothing, subserves no purpose, and that a *bona fide* holder of

¹ *Cagwin v. Town of Hancock*, [84 N. Y. 532; *Starin v. Genoa*, 23 N. Y. 430.

the bonds is bound to prove that the requisite number of voters did actually assent.

“They assert this as a general proposition. They do not assert that the statute so declares, or that such is even its implied requisition. There is therefore before us no such case of the construction of a State statute by State courts as requires us to yield our own convictions of the right and blindly follow the lead of others, eminent as we freely concede they are.”

The New York courts, since the above decision, have still continued to hold to the same opinion, and while referring to the above case of *Town of Venice v. Murdock*, refused to be controlled by it.¹

The Supreme Court, in the case of *Sciopio v. Wright*, 101 U. S. 665, reversed its decision in the case of *Township of Venice v. Murdock*, *supra*, wherein they refused to follow the decisions of the Court of Appeals of New York to the effect that power to subscribe to the stock of a railroad and to borrow money by an issue of bonds did not authorize an exchange of bonds for stock of the railroad, and in this latter case the Supreme Court of the United States held the bonds so exchanged void and followed the uniform decisions of the New York cases, on the ground that this was the settled construction of a State statute.

§ 183. **What the Federal courts recognize.**—The Federal courts follow the decisions of the State courts on questions of the extent and character of the powers which the various political and municipal organizations shall possess, and the settled doctrine of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the State.²

The Federal courts recognize and apply the rule that after a statute or constitution has been settled by judicial construction of the court of the last resort of the State,

¹ *Cagwin v. Town of Hancock*, 84 N. Y. 532.

² *Claiborne Co. v. Brooks*, 111 U. S. 406; *Francis v. Howard*, 50 Fed. Rep. 44.

the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself.¹

§ 184. **State court decisions must have been rendered before bonds were issued.**—The decision of the State court of last resort, in order to be binding upon the Federal courts, even though such decision is upon the construction of the State constitution, must be rendered before the bonds or other municipal paper were issued, if such decision of the State court is in conflict with previous decisions of the Federal courts,² but if such decision is not in conflict with the former decisions of the Federal courts, they will follow it, but the decision of the State court must have been upon the construction of the constitution or some statute.³

In one case, that of *Butz v. Muscatine*, 8 Wall. 875, the Supreme Court of the United States refused to follow the decision of the court of last resort, although upon the construction of a statute, and the United States courts had never before passed upon the question upon the ground that as the bonds were issued before the act was construed by the State court, the court was not bound to follow it, but could adopt its own construction.

This case has never been followed and is unlikely to be, as it would lead to endless confusion.

The Federal courts will follow the decision of the State courts on questions of the construction of the State constitution or enactments and hold bonds to be invalid issued after such decision of the State courts.⁴

The Federal courts will not follow the decision of the State courts, if the decision be based upon the construction of an act which is claimed to impair the obligation of a contract, because of the provision in the constitution of the United States that "no State shall pass

¹ *Douglass v. Pike Co.*, 101 U. S. 678; *Lee Co. v. Rogers*, 7 Wall. 607.

² *Carrol Co. v. Smith*, 111 U. S. 18 Wall. 71.

556.

⁴ *German Sav. Bk. v. Franklin*

³ *Olcott v. Fon Du Lac*, 16 Wall. Co. 128 U. S. 526-8.

any law impairing the obligation of contracts. If State courts were allowed to construe acts impairing the obligation of contracts, which construction the Federal courts were bound to follow, the decision of the State courts instead of that of the United States Supreme Court would construe this provision of the constitution, and as said in *Green v. Neal, Lessee*,¹ to this provision should be added the additional provision that "no State court shall change its rulings so as to impair the obligation of contracts entered into under its former rulings."

§ 185. **Legislative control over remedies—What becomes part of contract with the bondholder.**—The holders of municipal indebtedness are limited in their remedies for enforcement of their claims, and are unable to resort to the general means for their collection,² therefore a more modified rule exists as to the power of the Legislature to curtail their remedies than applies to other creditors.

As a general rule the property of a municipal corporation cannot be taken in execution to satisfy the debt, and the usual, and it might be said the only, means to obtain the money to satisfy a debt due to a creditor from the corporation is by *mandamus*.³ All the laws in force, when bonds or other indebtedness are issued which authorizes the levy of a tax to pay the principal or interest thereof, are a part of the contract between the municipality and the holders of such bonds or other evidence of indebtedness, and to repeal such laws is to impair the obligation of the contract.⁴

Any property or security or means of payment which was, at the time of the issue of bonds, devoted to their payment, cannot be diverted to other purposes, nor the statute so devoting them repealed. And where a sinking fund was pledged by the act creating the debt to

¹ 6 Pet. 299.

⁴ *Ralls Co. v. U. S.*, 105 U. S. 733;

² *Meriwether v. Garret*, 102 U. S. 472. *Van Hoffman v. Quincy*, 4 Wall. 535.

³ *Sherman v. Williams*, 19 S. W. R. 606. See § 166.

its payment, it was held that the Legislature had no authority to divert the fund to other purposes.¹ And the creditor may, by injunction, restrain the corporation from carrying out such a law.²

And when the ordinance under which the bonds are issued devotes certain property, or provides certain means for the payment of the principal and interest of the bonds, such provision cannot be afterwards repealed, or the income devoted to other purposes, as such a provision enters into and becomes a part of the contract.³

The laws of the State, with the construction placed upon them by the courts of last resort of the State, are a part of the contract, and such construction will be recognized and enforced by the courts of the United States in an action brought upon bonds or other written evidence of debt issued by municipal corporations.⁴

§ 186. **Same—Inferior security cannot be substituted Cases.**—When the act under which the bonds are issued provides that a special tax shall be raised to pay the interest and the principal when it shall become due, such provision becomes a part of the contract between the bondholder and the municipal corporation issuing the bonds, and is protected by the constitution of the United States which prohibits the States from passing any laws which will impair the obligation of the contracts, and this provision cannot be repealed or changed, unless another remedy equally efficacious is substituted.

The case of *Siebert v. Lewis*, 122 U. S. 284, is one which illustrates this doctrine.

In this case it appeared that under an act of Missouri passed March 28th, 1868, which authorized the issue of bonds, and provided "that in order to pay the interest and principal thereof the County Court shall from time to time levy and cause to be collected, in the same manner as county taxes, a special tax" to pay the interest and principal of the bonds.

¹ *Terry v. Wisconsin M. & F. Ins.*, 716; *Fazende v. Houston*, 34 Fed. Rep. 95; *Bassett v. City of El Paso*, 18 Wis. 87.

² *Fazende v. Houston*, 34 Fed. (Tex.) 30 S. W. R. 893.

Rep. 95.

⁴ *German Sav. Bank v. Franklin*,

³ *State v. Police Jury*, 111 U. S. 128 U. S. 526.

The bonds were issued and subsequently the Legislature passed an act which repealed the provisions of the former act, and instead of the special tax provided that taxes for the State, county and school should be levied as theretofore, but that no other tax should be levied, except on petition and order of a Circuit Court.

Subsequently the relator obtained a judgment on some of the bonds in the Circuit Court of the United States and applied for a writ of *mandamus* to enforce the collection of the special tax under the act of March 23, 1868. The Supreme Court, to which the matter was carried, held that the provision in the act which authorized the levy and collection of the special tax to pay the bonds was a part of the contract with the creditor, and could not be repealed, unless a remedy equally efficacious was substituted, and that the subsequent act did not provide as efficacious a remedy, but one that was, in fact, clogged with limitations and conditions and tended to delay and embarrass a creditor. The court said: "The question is not whether a tax shall be levied in Missouri without authority of law, but which of several of its laws are in force and govern the case," and the court held the act of 1868 was in force as to the relator's judgment and directed that a *mandamus* issue.

§ 187. **Same—Cases.**—And where the act under which the bonds are issued, or the charter of the city, directs that the principal and interest of the bonds should be raised and paid by taxation, this provision enters into the contract between the city and the bondholder, and cannot be repealed or changed to the disadvantage of the holder of the bonds.¹

In *Van Hoffman v. Quincy*, 4 Wall. 535, where a statute authorized a municipal corporation to issue bonds and levy a tax to pay them, and the bonds were issued and a subsequent act restricted the power of taxation, the court held that the power of taxation was a contract within the meaning of the constitution, and could not be withdrawn until the contract was satisfied, and that the Legis-

¹ *City of Galena v. Amy*, 5 Wall. | *Louisiana v. New Orleans*, 102 U. S. 705 : *State v. Madison*, 15 Wis. 33 : | 203.

lature, as well as the corporation, were bound by it, and any subsequent act restricting the power of taxation, if it materially affected the right of the creditor, was, as to all prior debts, a nullity.

In *Mundy v. Rahway*, 43 N. J. L. 338, where the bonds in suit had been issued by the city of Rahway, and the charter of the city at the time conferred upon the common council power to raise by tax each year such sum or sums as they should deem expedient for payment upon the city debt and such part of the principal thereof as should be due and payable, and also made it the duty of the assessors to assess the sum required. Subsequently the Legislature passed a supplement to the act in relation to the issue of writs of *mandamus*, the effect of such supplement being to deprive the bondholder of his immediate right to a *mandamus*, and in effect subordinate his claim to that of creditors of the city, whose claims were not yet due. The court held the statute to be unconstitutional and said: "The act would strip him (the bondholder) of his priority, and attempts what, in *Martin v. Somerville Water Power Co.*, 3 Wall. Jr. 206, was decided to be beyond legislative power. It is as if the Legislature enacted that no execution should issue to enforce a pre-existing judgment to the prejudice of the interests of creditors whose claims were not due," and as to the power to tax contained in the charter, said, "The power continued to exist when the relator's bonds were issued and still remains. Such a power in public officers becomes a duty, whenever the enforcement of private rights depends upon its exercise, and the language by which it is conferred, though permissive in form, is considered as in fact peremptory."

§ 188. **When obligation of contract is impaired.**—The obligation of the contract is impaired in the constitutional sense by any law which prevents its enforcement, or which materially abridges the remedy for enforcing it, which existed when it was contracted and does not supply an alternative remedy equally adequate and efficacious.¹

¹ *People ex rel. v. Common Council of Buffalo*, 140 N. Y. 300.

The Supreme Court, in *Louisiana v. New Orleans*, 102 U. S. 203, in speaking of the obligation of a contract, said : "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, '*Qui cito dat bis dat*,' He who gives quickly gives twice, has its counterpart in a maxim equally sound. '*Qui serius solvit, minus solvit*,' He who pays too late, pays less. And authorization of the postponement of payment or of means by which such postponement might be effected, is in conflict with the constitutional inhibition."

When the statute which authorized the issue of bonds provides that the municipality issuing the bonds shall not issue any other bond or incur any other debt until the bonds are paid, such a provision becomes a part of the contract, and the Legislature cannot afterwards authorize the corporation to issue other bonds or incur a further debt until the first bonds are paid.¹

Nor can the constitution of a State be amended so as to impair the obligation of a contract.² The contract should be read as of the time it is made, and of bonds as of the time they were issued, and the holder of the latter is entitled to all the provisions then in force for the payment of his debt, and no substantial change can legally be made which will tend to lessen his security.

§ 189. **No vested right to a particular remedy.**—A creditor has no vested right to a particular form of remedy, and the Legislature may change or modify remedies without incurring a violation of the constitutional provision, provided there still remain to the creditor a substantial and available remedy, but if the statute loads the remedy with conditions and restrictions, so as to render it practically worthless, or abrogates valuable rights secured by

¹ *Smith v. Appleton*, 19 Wis. 468; ² *State ex rel. Marchand v. New Board of Liquidation v. McComb*, Orleans, 37 La. 687.
92 U. S. 53.

contract, it violates the obligation of the contract, and is then in contravention of the constitution.¹

§ 190. **When creditors are without legal remedy.**—Creditors of a public corporation can be and frequently are, delayed and sometimes entirely deprived of all means of enforcing their remedy against the corporation and collecting their debts, by legislative acts passed subsequently to the inception of their debts, and this by the removal of the agencies through which the courts must act in enforcing the remedy of the creditors.²

A case illustrating this doctrine is found in *Thompson v. Wiley*, 46 N. J. L. 476, the facts appearing being that the city of Elizabeth became hopelessly insolvent and unable to meet its obligations, and in order to protect itself from its creditors a bill was drafted and introduced into the Legislature which became a law (P. L. 1884, p. 84), the scheme of which was to authorize the governor, upon proof that the local assessors failed to perform their duty, or in case of a vacancy in that office, to appoint three persons to be known as Commissioners of Taxation, whose duty it should be to assess taxes only for the current expenses of the city. The statute further provided that "all taxes levied in pursuance of this act shall be applied solely to the purpose for which they are levied, and it shall be unlawful to appropriate, or use, or direct, or order their appropriation or use for any other purpose or purposes whatsoever." The governor appointed the commissioners and they proceeded to act, and thus sufficient revenue was obtained to defray the current expenses of the city, and no means was provided whereby taxes could be raised to pay any of its old debts, and no officers were in existence who could be compelled by *mandamus* to raise by taxation money to pay such debts.

The Supreme Court held the act constitutional, and refused to grant a *mandamus*, holding that the commis-

¹ *Louisiana v. New Orleans*, 102 U. S. 203; *Cooley on Const. Limit.* 351-442; *Black on Const. Limit.* § 138.

² *Meriwether v. Garret*, 102 U. S. 472.

sioners had no power to levy taxes to pay the debts of the city.

The Legislature afterwards passed an act in relation to encumbered cities (P. L. N. J. 1885, p. 127), which authorized cities that were insolvent to compromise with their creditors and to issue bonds in settlement, and afterwards another act was passed which directed that the assessors in such cities should assess a special tax to pay the interest on such bonds. Under these various acts Elizabeth has been able to delay its creditors and has compromised its debt.

In *Meriwether v. Garrett*, 102 U. S. 472, 618, Mr. Justice Field in part said :

“ When creditors are unable to obtain payment of their judgments against municipal bodies by execution, then they can proceed by *mandamus* against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the Legislature with the taxing power, and such tax when collected cannot be devoted to other uses, but if the authorities possess no such power, or their officers have been abolished and the power withdrawn, the remedy of the creditor is with the Legislature, which alone can give them relief. No Federal court, either on its law or equity side, has any inherent jurisdiction to allow a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of the creditors and the apparent hopelessness of their position without the aid of the Federal court, it cannot seize the power which belongs to the legislative department of the State and wield it in their behalf.”

CHAPTER XIV.

DEFENCES.

Want of power—Estoppel by recitals—By whom the question of performance of conditions precedent shall be decided—Recitals of wrong act.

SECTION.

- 191—Want of power—What the term means—Always a good defence.
- 192—From what want of power arises—When a municipal corporation may be estopped to plead it as a defence.
- 193—Estoppel by recitals—Principle of the rule—*Bona fide* holder only protected by.
- 194—Execution and delivery—Effect of—Leading case on doctrine of estoppel.
- 195—Bonds must contain recitals—*Contra*.
- 196—Recital of enabling act sufficient—By whom must be made.
- 197—All enabling acts must be recited.
- 198—Effect of recital of enabling act only—What else should be recited.
- 199—No recitals, no estoppel, but record of corporation may be shown as an estoppel.
- 200—Effect of recital when no vote taken—Attitude of Federal courts.
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SECTION.

- 202—Last case criticised.
- 203—Effect of recitals.
- 204—Doctrine of recitals in New York.
- 205—Federal and State courts opposed.
- 206—Recitals of ordinances—Effect of.
- 207—Effect of recitals on constitutional conditions.
- 208—Same.
- 209—By whom the question of performance of conditions precedent shall be decided.
- 210—Same—When to be determined.
- 211—Recitals by the officer authorized to execute the bond sufficient.
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- 213—What officer may make the recitals.
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- 215—Author's conclusions as to what officers may make the recitals.
- 216—Recital of wrong act—Effect of, valid if power exists.

§ 191. Want of power—Always a good defence.—
This expression is used in reference to municipal cor-
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porations in relation to their issue of written evidence of debt to denote the utter lack of authority in the corporation to issue the paper.

The expression is used for that purpose by all text-writers on municipal corporations as well as by the courts in cases founded upon municipal paper.

If the corporation has no power to issue the bonds or other evidence of corporate debt, the same are invalid in the hands of every person,¹ and the purchaser of municipal paper must ascertain for himself, whether the corporation has the power to issue the paper. Therefore one of the first steps to be taken by intending purchasers of municipal paper is to investigate if there is any authority for the issue of the paper, and if the statute, whether it be the charter of the corporation or some general or special law, under which the paper is, or is about to be, issued, is constitutional, or if constitutional is sufficient in scope to permit of the issue of the paper, and also to ascertain whether the purpose of the act is public or private.

§ 192. Want of power arises from the following causes.

—1. Because the bonds are issued without authority of any statute.

2. Because the statute under which the bonds are issued contravenes some provision of the State constitution.

3. Because the bonds are issued for some private and not a public purpose.

4. Because the power exercised is different from that delegated.

5. Because some of the conditions precedent to the issue of the paper, as for instance the signatures of a certain number of taxpayers, the presentation of a petition, or the consent of the electors, have not been obtained or performed, or no election has been held although required, and only upon such compliance are the bonds to issue.

¹ Coffin v. Board of Comr's, 57 Fed. Rep. 137; Dixon Co. v. Field, 111 U. S. 83; Swan v. City of Arkansas, 61 Fed. Rep. 478; City of Fulton v. Northern Ill. College, 42 N. E. R. 138; Travellers' Ins. Co. v. Township of Oswego, 55 Fed. Rep. 361.

6. Because the total amount of paper issued exceeds the statutory or constitutional limit.

In the first two cases the paper is void for want of power and cannot be cured by any act of the municipal corporation.

In the last four cases the paper, although issued without authority, or in excess of authority, may yet be held good in the hands of a *bona fide* holder because of recitals contained in the paper made by the officers of the corporation issuing it which assure the purchaser that the paper is lawfully issued ; provided there exist statutory authority for the issue of paper such as the paper in the hands of the *bona fide* holder purports to be, and although the paper contains no recitals the municipality may be estopped by its acts from repudiating it.¹

The true meaning of the term " Want of Power " is the total lack of authority in the corporation to act, and every act done by the municipal corporation without power is void and cannot be made valid by any act of the corporation or its officers, therefore the last four cases cannot logically, except where no election has been held although necessary,² be construed to arise from want of power, when the term is used in its true sense. They arise from irregular or illegal use of the power, and for that reason are illegal.³

§ 193. **Estoppel by recitals—Principle of that rule.**—Although, as heretofore shown, want of power may arise because some of the conditions precedent to the issue of the bonds or other municipal paper have not been complied with, have been irregularly complied with, and only upon the performance of such prior conditions were the bonds to issue, yet the courts, by a course of adjudications, have qualified this rule, if the bond itself recites a compliance with the conditions precedent, and is in the hands of a *bona fide* holder. As between the immediate parties, it is held that the inquiry is open whether the conditions precedent have in fact been complied with, and

¹ See, §§ 240-255, *post*.

² See §§ 200, 201, 202.

³ See § 124, as to what defence may be set up against a *bona fide* holder.

not the issue will be enjoined, or in the hands of the original parties or holders with notice an action to enforce, if no estoppel exists, can be successfully defended.¹

The principle upon which the rule of estoppel rests in cases of this kind is, that the municipality having declared by its recitals in its bonds that all the conditions precedent and necessary to empower it to issue the bonds under the enabling statute have been complied with, and thereby leads the purchaser to believe that such facts are true, so that he makes no investigation of them but rests solely upon such recitals, it is estopped when the purchaser seeks to recover upon such bonds and coupons from showing that they were in fact untrue. It cannot deny its statements or decision so recited.

It is necessary, however, that the bonds or other evidence of debt containing the recitals, in order to operate as an estoppel, should be in the hands of a *bona fide* holder who obtained the same before maturity and for value and without notice, or in the hands of a person who obtained the same from such a *bona fide* holder. See the remarks on *bona fide* holder in another part of this work for a fuller discussion of the particular branch of the effect of recitals.² There can be no estoppel before the issue of the bonds.³

The recitals in bonds are binding only as to matters of fact and not as to matter of law, of which latter every person is bound to take notice and is conclusively presumed to have done so.⁴

§ 194. **Execution and delivery—Effect of—Leading cases on doctrine of estoppel.**—The mere execution and issue of bonds which do not contain a recital of the performance of prior conditions will not estop the municipality from setting up the fact of non-performance of such conditions. Such execution and issue is but *prima facie* evidence of compliance with prior conditions, and

¹ Chambers Co. v. Clews, 21 Wall. 318.

² See § 116 *et seq.*

³ Union Pac. R. Co. v. Lincoln Co., 3 Dill. (U. S.) 300.

⁴ U. S. v. Town of Cicero, 41 Fed. Rep. 83.

the contrary may be shown,¹ unless the municipality be estopped for other reasons, such as laches, acquiescence, payment of interest or principal.²

The leading, as well as the earliest, case upon the subject of the effect of recitals contained in bonds is that of *Commissioners of Knox Co. v. Aspinwall*, 21 How. (U. S.) 539, decided in 1858.

The doctrine in this case has never been overruled,³ although in several subsequent cases it has been attacked in vigorous dissenting opinions by the minority of the United States Supreme Court,⁴ particularly in that of *Town of Coloma v. Eaves*, 92 U. S. 484, but the majority of the court, in a very elaborate opinion, sustained the former doctrine as to the effect of recitals.

In this case the action was brought by a *bona fide* holder of certain coupons attached to negotiable bonds of the County of Knox in the State of Indiana. The bonds were issued in payment of a subscription to a railroad, and the ground of defence was that the notice of election which the statute required to be given was given by the board of commissioners, instead of by the sheriff of the county, as the enabling act required. The bonds each recited: "This bond is issued in part payment of a subscription of \$200,000 by the said County of Knox to the capital stock of the Ohio and Mississippi Railroad Company, in pursuance of the third section of act, etc. (reciting the enabling act), passed by the General Assembly of the State of Indiana and approved January 15th, 1849."

The act under which the bonds in this case were issued did not designate who were to decide as to the performance of the prior conditions, but authorized the board of county commissioners to execute the bonds.

Therefore two separate questions were decided by this case: one as to the effect of the recitals contained in the

¹ *Lyde v. Winnebago Co.*, 16 Wall. 13; *Marsh v. Fulton Co.*, 10 Wall. 676; *Dill. on Mun. Corp.* (4th ed.) § 522. See, however, *Mutual Ben. L. Ins. Co. v. Elizabeth*, 42 N. J. L. 235; *Cotton v. New Providence*, 47 N. J. L. 401. See § 195.]

² See these subjects elsewhere herein. § 195 and note.

³ *Dill. on Mun. Corp.* (4th ed.) § 523 and notes.

⁴ *Humbolt Town v. Long et al.*, 92 U. S. 642.

bonds, and the other as to the implied authority of the officers to pass upon the question of performance of the precedent conditions.

As to the first, Mr. Justice Nelson, rendering the opinion of the court, said :

“ Another answer to this ground of defence is that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained from the fact of the subscription by the board to the stock of the railroad company and the issuing of the bonds. The bonds on their face import a compliance with the law under which they are issued (quoting the recital of the bond above set forth).

“ The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power.”

§ 195. **Bonds must contain recitals—Contra.**—The above language would seem to imply that the mere execution of the bonds would estop the municipality from showing the non-performance of the prior conditions. But as the bonds recited the enabling act, these remarks of the court were made as a further and unnecessary argument in sustaining the opinion, and the suggestion therein contained has not been followed in any of the subsequent decisions of the Federal, or, so far as the writer knows, State courts, except in New Jersey and Missouri.¹

¹ *Mutual B. L. Ins. Co. v. Elizabeth*, 42 N. J. L. 235; *Cotton v. New Providence*, 47 N. J. L. 401. See subject of statutory over-issue.

In the case of *Mutual Benefit Life Ins. Co. v. Elizabeth*, 42 N. J. L. 235, where it was claimed that the renewal bonds in suit were in excess of the limitation prescribed by statute, it does not appear from the case that the bonds contained recitals of any kind, and the decision of the court is put upon the mere issue of the bonds.

The court, after reviewing some of the decisions of the Federal

courts, relative to the weight given recitals in bonds, and reciting with approval the opinion of Mr. Justice Bradley in *Town of Coloma v. Eaves*, *infra*, and after criticising the doctrine of estoppel as applied to recitals in some cases, said :

“ For my own part I am not able to concur in the view that a legislative intention to make a particular officer a tribunal to decide whether the prerequisites to the exercise of the authority existed at the time of its exercise, can be raised by construction alone, when the same act provides that the existence of such

and in some subsequent opinions of the United States courts is expressly overruled.¹ And yet when one famil-

prerequisites shall be made a matter of record . . . such inference is, in my judgment, in another class of cases, entirely legitimate. I refer to those instances in which the authority of the agent is made to depend on a certain state of facts, whose existence or non-existence is exclusively, or at least peculiarly, within the knowledge of such agent. . . . In such case the deduction becomes well-nigh irresistible that the tenure of the instruments of this character was not intended to be so obscure and precarious. . . .

The facts upon which the question whether a given bond was, in renewal of bonds which had been issued in contemplation of the assessments, mentioned in the act of March 29th, 1871 (the act under which the bonds in suit were issued) were not ascertainable to a reasonable degree of certainty by any one who was not an officer of the city conversant with its affairs.

"Therefore the plaintiff in this case was not called upon to endeavor to look into the situation, but had the right to rely on the action of the municipal officers, who by *issuing the bonds* affirmed that the requisite condition of things existed."

The syllabus of this case would lead one to believe that the bonds in suit contained recitals, it being as follows:—

"3. When a municipal council is authorized to issue bonds when certain facts exist, and such facts are exclusively within the knowledge of the council, it is to be inferred that the lawmakers intended to make such council the judge whether such condition precedent has been fulfilled, and a purchaser

can rely securely on the *statements* to that effect *contained in the bonds*."

In *Cotton v. New Providence*, 47 N. J. L. 401, the above case is cited with approval.

Another case which asserts the same principle is that of *Barrett v. County Court of Schuyler Co.*, 44 Mo. 197. The bonds in suit contained no recitals, and were issued by a county court to pay for a subscription to a railroad.

The defence was that the conditions imposed upon the road had not been complied with, and also that no election had been held to authorize the subscription. The bonds in suit were in the hands of a *bona fide* holder.

The court, after referring to other acts of alleged estoppel, said :

"Besides, the issue of the bonds in 1859 was a ratification of the subscription, and warranted the purchaser of them in assuming that such election, if required by law, had been duly held, and that the condition to the subscription had either been complied with or waived."

See also *Flagg v. Palmyra*, 33 Mo. 440.

¹ Mr. Justice Bradley delivered the following concurring opinion:—

"I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of *Knox County v. Aspinwall*, to-wit, that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed is conclusive proof of its performance.

iar with the mode of issuing municipal bonds gives the matter a thought, it would seem that the execution and

If, when the law requires a vote of taxpayers, before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute, and who does execute the bonds, and if the bonds themselves contain a statement or recital that such a vote has been given, then the *bona fide* purchaser of the bond need go back no further.

"He has a right to rely on the statement as a determination of the question. But a *mere* execution and issue of the bonds without such recital is not, in my judgment, conclusive. It may be *prima facie* sufficient; but the contrary may be shown.

"This seems to me to be the true distinction to be taken on the subject: and I do not think the contrary has ever been decided by this court.

"There have been various *dicta* to the contrary, but the cases, when carefully examined, will be found to have all the prerequisites necessary to sustain the bonds, according to my view of the case. This view was distinctly announced by this court in the case of *Lynde v. The County of Winnebago*, 16 Wall. 13.

"In the case now under consideration, there is a sufficient recital in the bond to show that the proper election was held and the proper vote given: and the bond was executed by the officers whose duty it was to ascertain these facts. On this ground, and this alone, I concur in the judgment of the court."

In *Buchanan v. Litchfield* (102

U. S. 278, 292-3), Mr. Justice Harlan, who delivered the opinion of the court, *inter alia* said:—

"The present action cannot be maintained unless we should hold that the *mere fact* that the bonds were issued without any recitals of the circumstances bring them within the limit fixed by the constitution, was, in itself, conclusive proof, in favor of a *bona fide* holder, which authorized them to be issued. We cannot so hold."

In *Carrol Co. v. Smith*, 111 U. S. 556, the bonds in suit merely stated that the subscription to the capital stock of a railroad company was authorized by certain statutes mentioned in the bonds.

The defence was that the bonds had not been authorized by a two-thirds vote of the registered voters.

The court, by J. Matthews, said:—

"We do not think the plaintiff in error is precluded from raising this question by any recitals in the bonds. They contain no statement of any election called or held, or of the vote by which the issue of the bonds was authorized. They do not embody even a general statement that the bonds were issued in pursuance of the statutes referred to. The utmost effect that can be given to them is that of a statement, that a subscription to the capital stock of the railroad company was authorized by the statutes mentioned, and that the sum mentioned in the bonds was part of it. They serve simply to point out the particular laws under which the transaction may lawfully have taken place. They say nothing whatever as to any compliance with the requirements of the statute in respect

issue of the bonds should have as much force and operate as an estoppel as fully as the mere recital in the bond of the enabling act, without any recital alleging performance of prior conditions. The bonds are usually executed by persons who do not know the effect of a recital of the act as an estoppel, and it is usually recited by them merely for the purpose of informing purchasers of the power of the municipality to make the issue, and with no idea of impliedly asserting by its recital performance of prior conditions.

§ 196. **Recital of enabling act sufficient—By whom must be made.**—However, it is now well settled that the mere recital in the body of the bond that it is issued pursuant to, or in conformity with, the enabling act reciting it will operate as an estoppel and prevent the corporation from setting up as a defence against an innocent holder that in fact the prior conditions have not been performed;¹ provided, however, that the recitals are made by persons charged with the duty of determining whether or not the prior conditions were performed, and the municipality had the power to issue the bonds, because if there be a want of authority to make the issue, the bonds are void, no matter what

to which the board of supervisors were authorized and appointed to determine and certify. They do not, therefore, within the rule of decision acted on by this court, constitute an estoppel which prevents inquiry into the alleged invalidity of the bonds."

In *Lewis v. Bourbon Co.*, 12 Kan. 186, where the bonds in suit contained no recitals, it was held that every holder was bound by notice of whatever appeared upon the face of the records.

In *Hopper v. Covington*, 118 U. S. 118, where the suit was on a bond which contained no recitals, the court said:

"The bonds in suit contain no statement of the purpose for which

they were issued and no recital which can bind the town by way of estoppel, any one suing on the bond is bound to allege and prove the authority of the town to issue them.

... In each of the cases cited, the defects suggested were in the requisite preliminary proceedings, and the bonds sued on appeared, by recitals, upon their face to have been issued according to law."

¹ *Knox Co. v. Aspinwall*, 21 How. 539; *Com'rs of Douglass Co. v. Bolles*, 94 U. S. 104; *Citizens Sav. & Loan Asso. v. Perry Co.*, 156 U. S. 692; *Oregon v. Jennings*, 119 U. S. 71; *Coler v. Dwight*, 55 N. W. R. 587; *Inhabitants v. Morrison*, 133 U. S. 523; *German Bank v. Franklin Co.*, 128 U. S. 526.

recitals they contain.¹ In *Dixon Co. v. Field*, 111. U. S. 83, the court said: "It is not necessary that the recital should enumerate each particular fact essential to the existence of the obligation.

"A general statement that the bonds have been issued in conformity with the law will suffice so as to embrace every fact which the officers making the statements are authorized to determine and certify."² The statement that the bonds were issued "in pursuance to a vote of the electors of Anderson County, September 13th, 1869," was held in favor of an innocent holder to be equivalent to a statement that the vote was one lawful and regular in form, and the court refused to permit evidence to be given that the proper notice of election was not given.³

§ 197. **All enabling acts must be recited.**—But when the bonds are issued pursuant to more than one act, or some other act or acts besides the enabling act, or the State constitution in some manner controls or effects the issue by imposing prior conditions or requirements, then, unless the bonds recite that they are issued pursuant to all such acts or the constitutional requirement, if some of the precedent conditions imposed by the non-recited act or the constitution were in fact not performed, the municipality will not be estopped from alleging the same as a defence.⁴

§ 198. **Effect of recital of enabling act only.**—The mere recital in the municipal paper that it is issued pursuant to, or in conformity with, the enabling act, the title and time of approval or passage of which are recited, will estop the municipality from pleading as a defence the non-performance only the precedent conditions required to be performed by the act, but does not estop the municipality from pleading the non-performance of other necessary steps in the issue of the bonds.

¹ *Broadway Sav. Inst. v. Town of Pelham*, 83 Hun (N. Y.) 96; *Coffin v. Board of Com'rs of Kearney Co.*, 57 Fed. Rep. 137; *Swan v. City of Arkansas*, 61 Fed. Rep. 278.

² *Douglass Co. v. Bolles*, 94 U. S. 104.

³ *Anderson Co. v. Beal*, 113 U. S. 227.

⁴ *Citizens' Sav. Asso. v. Perry Co.*, 156 U. S. 692; *Nat. Life Ins. Co. v. Huron*, 62 Fed. Rep. 778.

as for instance the passage of an ordinance, its signing by the mayor and publication, or the adoption of a resolution or other action necessary to be done or taken before the bonds are actually executed and issued.

In order to work an estoppel in such cases the bond must contain recitals of the performance of such subsequent acts, either in detail or in some language sufficient to embrace a recital of the performance of all such subsequent necessary acts, and the recitals must be made by the officers whose duty it is to pass upon the question of compliance.¹

When the bonds recite upon their face that they are issued pursuant to an ordinance of the common council of the municipality, or pursuant to a vote of the qualified voters of the city, or pursuant to a petition of the necessary number of legal voters, such recital estops the municipality from denying the truth of the recitals.²

§ 199. **No recitals, then no estoppel.**—If the bonds contain no recitals, then the municipality will not be estopped to show the non-performance of the necessary prior conditions or any other fact as a defence, unless it be otherwise estopped,³ and when the bond refers to a wrong act, non-performance of prior conditions of the non-recited enabling act may be shown as a defence, but in all such cases the record of the municipality may be placed in evidence to prove performance.⁴

§ 200. **Effect of recital when no vote taken—Attitude of Federal courts.**—The question whether the bonds or other municipal paper issued in pursuance of an enabling act, which authorized their issue after the question whether they should issue or not had been submitted to the legal voters, and had received a majority, or other proportionate vote, and the bonds recited either the

¹ *Swan v. City of Arkansas*, 61 Fed. Rep. 478; *Nat. Bank of Commerce v. Town of Granada*, 54 Fed. Rep. 100.

² *Bissel v. Jeffersonville*, 24 How. 134; *Van Hustrup v. Madison City*, 1 Wall. 291; *Mercer Co. v. Hackett*, 1 Wall. 83.

³ See § 240 *et seq.*

⁴ *Crow v. Oxford*, 119 U. S. 215-22; *Citizens' Sav. Asso. v. Perry Co.*, 153 U. S. 692-701; *Dill. on Mun. Corp.*, 522; *Marsh v. Fulton*, 10 Wall. 676; § 195, *supra*, and note.

enabling act, or that and the further fact that such a vote had been taken, when in fact no vote was had, would be valid or not in the hands of a *bona fide* holder, has never, so far as the writer can learn, been directly decided in the Federal courts. The question has in several cases been referred to in deciding on the validity of municipal bonds, which, however, did not call for a direct decision on the point in question.

It would appear, however, from the language used in the cases that if the point were directly presented to the Supreme Court of the United States, and the validity of the bonds depended upon such recitals, and the bonds were issued by the officers of the municipality who had power to pass upon, or were required to pass upon the question of compliance of the precedent conditions, that that court, following the natural result of the doctrine of estoppel by recitals contained in municipal paper, as established by it, would sustain the bonds.

The two following cases illustrate the attitude of the Supreme Court of the United States on this point, although the question was not directly presented, nor did the validity of the bonds depend upon the question whether or not a vote at all had been taken.

In the case of *Northern Bank v. Porter Township*, 110 U. S. 608-17, Mr. Justice Harlan, in delivering the opinion of the court, used the following language in reference to the effect of recitals, when in fact no vote was taken :

“ Had the statute of Ohio conferred upon a township in Delaware County authority to make a subscription to the stock of this company upon the approval of the voters at an election previously held, then, a recital, by its proper officers, such as is found in the bonds in suit, would have estopped the township from proving that *no election was in fact held*, or that the election was not called and conducted in the manner prescribed by law, for in such a case it would be clear that the law had referred to the officers of the township, not only the ascertainment, but the decision, of the facts involved in the mode of exercising the power granted.”

In the case of *Commissioners etc. v. Bolles*, 94 U. S. 104-

109, where the bonds recited the enabling act, and the further fact that they were issued in pursuance of, and in accordance with, the vote of a majority of the qualified electors of the said County of Douglass, at a special election regularly called and held on September 12th, 1865, Mr. Justice Strong, in delivering the opinion of the court of the effect of these recitals, said :

"They are untrue if the board had not followed the directions of the law, and if there had not been a popular vote at an election approving the issue of those bonds. The truth or falsity of the assertion cannot be inquired after here, for, as we have said, the recitals are practically an annunciation of the board that all the steps required by law had been taken. Behind such a recital, as we have seen, a *bona fide* holder for value is not bound to look, except for legislative authority."¹

§ 201. **Same—State courts—Decisions.**—In Missouri the question has been directly presented and been decided against the validity of the bonds, the court holding that when an election is required before the bonds may issue and no election is in fact held, that there is want of power in the municipality to make the issue, and therefore the bonds are void in the hands of all persons. The court also referred to the decisions of the U. S. Supreme Court up to that time (1871), and limited the language used therein to the facts before the court.²

¹ See also *Mayor v. Lord*, 9 Wall. 411; *Warren v. Marcy*, 97 U. S. 96. See § 211.

² *Steins v. Franklin Co.*, 48 Mo. 167; *Carpenter v. Lathrop*, 51 Mo. 483.

In *Carpenter, Jr., v. Inhabitants of Town of Lathrop*, 51 Mo. 483. The bonds in this case recited that they were issued pursuant to an order of the trustees authorized by a vote of the people of said town at a special election held for that purpose.

The record of the trustees showed that an election was ordered and

that the bonds were ordered to be printed "in accordance with the orders voted on by the people of Lathrop on the 6th day of November, 1869."

The testimony of the clerk showed that sixteen votes were cast in all, in favor of the subscription. But no testimony indicated when an election was held or that there were any judges of election, or that any poll-books were kept, or that a return of the votes had been made to any body or officer authorized to decide the result.

It was held the issue of the bonds

In the case of *Spitzer v. Village of Blanchard*, (Supreme Court of Michigan) 46 N. W. R. 400, it appeared bonds were issued for the payment of a fire apparatus. The bonds were executed by the clerk and president of the village, and contained the recital that they were issued "in conformity with the general law of the State under which the said village is incorporated, and authorized by the board of trustees at a regular meeting thereof."

The village had no power to issue the bonds except by authority of an affirmative vote. No election was held.

The plaintiff was a *bona fide* holder without notice, and insisted that the village was estopped by the said recitals, but the court held the bonds to be void, and on the question of estoppel by the recitals said :

"In this case there was no authority in the council or in the president or clerk to issue the bonds in the suit, unless first authorized to do so by a vote of the electors, and the law did not make the president and clerk the judges of the fact as to whether there had been an election or not, and consequently the recitals in the bonds

was unauthorized, and that the holder could not recover.

The holder must show that an election was held.

It was held in Michigan that a recital in a school bond signed by two or three members of a school-district board, that the bond is issued pursuant to a vote of the qualified electors, at a special school meeting held at a designated date and place, in accordance with law, is sufficient to protect a *bona fide* holder, though the records of the board do not show its authority to issue the bonds. It was further held that the board was the proper tribunal to determine whether the proper proceedings had been taken. That it was a question of fact. *Gibbs v. School Dist. No. 10*, 88 Mich. 334.

On the other hand, it has been

held in Missouri that the recitals in a bond of a public corporation, as a school district, are neither *prima facie* nor conclusive evidence of the required authority to issue the same, and that in an action thereon all the steps necessary to confer the authority to issue them must be proved, whether the bonds recite that these steps have been taken or not. *Heard v. Calhoun School Dist.*, 45 Mo. App. 666. In this case it was held that as the records of the school-district board showed that the proceedings necessary to be taken had been performed, such records were *prima facie* evidence of regularity, and that the authority to issue the bond having thus been established, irregularities in their issue could not affect *bona fide* holders.

that they had been issued in accordance with law bound no one and protected no one dealing with the bonds."

§ 202. **Last case criticised.**—This case, it would seem, is in direct conflict with the decisions of the Federal courts so far as the question as to whether the trustees or their agents, the president and clerk of the village, were authorized to pass on the question of performance of prior conditions. The trustees were to issue the bonds after an affirmative vote.

That was their authority to make the issue, and certainly they were to pass upon the question whether or not a vote was taken, and whether it was in the affirmative or not, after which, if affirmative, they were to make the issue, and as the bonds contained a recital of the enabling act the writer is of the opinion that the trustees or their agents had authority to make the recital. If, however, the case had been decided upon the want of power in the trustees to make the issue, because of the want of an election, the judgment of the court would have been put upon grounds easily understood, because no recitals will estop a corporation from showing that it had not the power to issue the paper. We are of the opinion that when a vote is a necessary prior condition to the issuing of bonds, or the incurring of a debt, that if no vote is taken, no election in fact held, that the municipal authorities have no power to make the issue or incur the debt, and that in such a case the corporation should not be estopped to set up the omission as a defence. The acts of the corporation in issuing the bonds should be held to be *ultra vires*.

§ 203. **Effect of recitals—Cases.**—Clifford, J., in *St. Joseph Township v. Rogers*, 16 Wall. 644, rendered a very able and concise opinion on the general effect of recitals contained in municipal paper, a part of which is as follows: "Bonds payable to bearer issued by a municipal corporation, if issued in pursuance of a power conferred by the Legislature, are valid commercial instruments, but if issued by such a corporation which possessed no power from the Legislature to grant such aid, they are invalid even in the hands of an innocent holder. Such power is

frequently conferred to be exercised in a special manner or subject to certain regulations, conditions or qualifications, but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the Legislature and that the bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all of those recitals are incorrect will not constitute a defence in a suit on the bonds or coupons, if it appeared it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulations, conditions or qualifications which it is alleged were not fulfilled."

An extreme case illustrating the effect of recitals is that of *Lexington v. Butler*,¹ decided by the United Supreme Court in 1871.

The facts appearing were that the city was authorized to subscribe to a railroad upon a majority vote. The proposition submitted to the voters contained certain conditions, among them being that other parties should subscribe \$1,000,000. The proposition was carried, but the other parties did not subscribe. The city refused to subscribe and issue the bonds. Afterwards they did so on the order of the court. This order was appealed from and set aside by the Court of Appeals of the State, which held that until the other parties subscribed the one million dollars the city had no authority to subscribe or issue its bonds.

The bonds were signed by the mayor and clerk and recited the enabling act.

The court held the bonds to be valid in the hands of a *bona fide* holder, and that the recital precluded the city to set up the non-subscription of the other parties as a defence.

The court said: "As the repeated decisions of this court have established the rule that when a corporation has *power under any circumstances* to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the

¹ 4 Wall. 282.

requisite authority, and that they are no more liable to be impeached in the hands of such a holder than any other commercial paper."

In this case there was no want of power to issue because the statute and vote gave the power, but it was exercised in an irregular manner. The holder had the right to presume that the conditions, whatever they were, had been complied with, being so assured by the recital of the enabling act.

§ 204. **Doctrine of recitals in New York.**—The courts of New York have not gone the length of those of the Federal courts and other State courts in the matter of estoppel by recitals in bonds when issued in aid of railroads.¹

The early case of *Staring v. Town of Granada*, 23 N. Y. 439, wherein it appeared a town was authorized to borrow money to subscribe for stock in a railroad corporation provided the written assent of two-thirds of the resident taxpayers was first obtained. The officers, who were named in the statute to make the issue, were directed before doing so to make affidavit that the persons who assented to such issue of bonds in writing were two-thirds of all the residents. The officers named to make the affidavit to such assent were the supervisors and the assessors of the town. They made the necessary affidavit and filed the same with the clerk of the county, as directed by the statute and then issued the bonds. Each bond recited that it was issued under the enabling statute reciting it. The principal defence to the suit on the bonds was that the necessary number of the residents had not signed the assent, and that the affidavit of the town officers that they had was untrue.

The court held the bonds to be void for this reason, and that the affidavit was but *prima facie* evidence and could be proved to be untrue in an action to enforce the bonds.

The doctrine of the above case has been repeatedly followed in later decisions in the same State.²

¹ The constitution of New York now prohibits such aid.

² *Cagwin v. Town of Hancock*, Hill, 99 N. Y. 324.

§ 205. **Federal and other State courts opposed.**—This doctrine is in direct opposition to that of the Federal and most of the State courts.

The Supreme Court of the United States, in the case of *Town of Venice v. Murdock*, 92 U. S. 494, in a suit brought to enforce bonds issued under the New York statute, refused to follow the above doctrine of New York courts, and held the recitals contained in the affidavits conclusive, and the bonds valid.

Mr. Justice Strong, delivering the opinion of the court, said: "It is obvious that if the act of the Legislature which authorized an issue of bonds in aid of the construction of the railroad on the written assent of two-thirds of the resident taxpayers of the town, intended that the holder of the bonds should be under obligation to prove by parol evidence that each of the two hundred and fifty-nine names signed to the written assent was a genuine signature of the person who bore the name, the proffered aid to the railroad was a delusion.

"No sane person would have bought a bond with such an obligation resting upon him whenever he called for payment of principal or interest.

"If such was the duty of the holder it was always his duty.

"The Legislature created a tribunal to determine whether two-thirds of the resident taxpayers had consented. They were the appointed agents to obtain the assent, and were to make an affidavit that the persons whose written assent was attached to the statement comprised two-thirds of the resident taxpayers. That statement, with their affidavits, was to be filed in the county clerk's office. All this indicates unmistakably that it was their appointed province to decide whether the conditions precedent to the exercise of their authority to issue the bonds had been complied with."

The court refused to be controlled by the decisions of the New York courts, holding that the doctrine of New York courts was not founded upon the construction of the statute under which the bonds were issued.

§ 206. **Recitals of ordinances.**—If the ordinance pro-

viding for the issue of the bonds recites that the conditions precedent have been complied with, the municipality will be estopped to deny compliance, and the effect is the same as if the recitals were in the bonds themselves.¹

The recital in the bond that it was issued pursuant to an ordinance of the municipality will not estop the corporation from showing that in point of fact no ordinance for the issue of bonds was in fact passed.²

A recital in municipal bonds that they are issued under an ordinance "adopted" does not estop the town from showing the ordinance was never published as required by law, and is therefore void, unless the officers who signed the bonds had some duty to perform in relation to the publishing of or determining when they had been published according to law,³ but recitals made in the bonds by the officers who have charge of the issue, and are expressly or impliedly authorized to determine whether the conditions precedent have been complied with, will estop the town.⁴

§ 207. **Effect of recitals on constitutional conditions.**—When the constitution of a State provides that at the time the bonds or other municipal paper are issued that some act must be done, as, for instance, the creating of a sinking fund to provide for the payment of the principal and interest when it falls due, or providing for the levying of a tax to pay the principal and interest, or the doing of some other act by the body issuing the bonds or incurring the indebtedness and the performance of such constitutional requirement is not complied with, but the paper is issued, and it recites in terms that all the acts necessary to be done have in fact been performed before the issue of the paper, or any other expression, the purport of which is to allege full compliance of the necessary acts, and the recitals are made by the municipal officers who

¹ *Gause v. City of Clarksville*, 1 *Town of Granada*, (C. C. A.) 54 Fed. Rep. 353.

² *Swan v. City of Arkansas*, 61 Fed. Rep. 478.

³ *Coler v. Dwight School Tp. of Richmond Co.*, (N. D.) 55 N. W. R.

⁴ *National Bank of Commerce v.* 587.

are qualified to pass upon the question of performance and make such recitals, the municipality will be estopped to show that in point of fact the constitutional requirements have not been complied with.

In such cases the constitutional prior conditions are to have no more force and effect than statutory ones, and the corporation will be estopped by such recitals as fully as if the precedent conditions were but statutory.¹

The case of *National Life Insurance Company v. City of Huron*, 62 Fed. Rep. 778, is one in point. It is well considered and illustrates the general doctrine of estoppel by recitals as well as the question under discussion, and is therefore given almost in full.

The bonds were issued by the Board of Education of the city, pursuant to a general statute, and after the question of issue had been submitted to the legal voters and decided in the affirmative. They were signed by the president of the board, attested by its clerk, and countersigned by its treasurer, the statute having directed them to be so signed, as did also a resolution of the board.

The bonds recited: "That all acts and conditions and things required to be done precedent to and in the issuing of said bonds have duly happened and been performed in regular and due form as required by law," and also recited the enabling act.

The action was brought upon three hundred coupons, cut from one hundred and twenty bonds of said issue.

Among the points raised by the defence was the fact that the constitution of South Dakota, sec. 2, art. 13, required that any city, county, town or school district or other subdivision incurring indebtedness shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof when due.

This was not done, and Sanborn, Circuit Judge, who delivered the very able opinion of the court, said:

"Whether or not this provision of the constitution is

¹ *Pana v. Bolles*, 107 U. S. 529-355. See, however, §§ 137, 138 539; *Oregon v. Jennings*, 119 U. S. *supra*.

74; *Chaffee Co. v. Potter*, 112 U. S.

mandatory or simply executory . . . are questions which we will not now consider. We remark in passing that the cases of *Wilson v. Shreveport*, 29 La. Ann. 673, *Knox v. City of Baton Rouge*, 36 La. Ann. 427, and *City of New Orleans v. Clark*, 95 U. S. 644, which suggest that bonds may be void that are issued in violation of constitutional provisions, which require the provision for the collection of an annual tax to pay them to be contained in the act or ordinance which authorizes their issue, have no relevancy to the question before us. . . . It is well settled that all purchasers must take notice of the existence and contents of the statute or ordinance under which the bonds declare that they are issued. If, as in *National Bank of Commerce v. Town of Granada*, *supra*, the ordinance recited in the bonds was never passed, or never took effect, the mayor and the clerk of the town who signed the bonds could not enact it into an ordinance by referring to it, and the purchasers must take notice that no act of theirs could give these agents the necessary authority to issue the bonds. If, as in *Coffin v. Board*, 6 C. C. A. 288, the statute recited in the bonds expressly prohibited their issue at the time they were issued, purchasers must take notice of that provision of the law; and the recitals in the bond to the effect that all requirements have been complied with will not relieve them of this notice, because no compliance or act of the county or its commissioners would enable them to make a lawful issue of the bonds at the time they were issued.

"The distinction between these cases and that at bar is marked and manifest. An examination of the statutes or ordinances recited in the bonds in those cases disclosed the fact that it was not in the power of representatives who issued them, by any act of theirs to make a lawful issue of the bonds, and that if they have done every act and performed every condition in their power the bonds would still have been unauthorized. In the case at bar there was no lack of power in the board of education to make a lawful issue of bonds when those in suit were issued. Article 3 under which they were issued provided that the taxable property of the whole corporation should

be subject to taxation by them (section 1825, Comp. Laws Dak.), and that they should annually levy a sufficient amount to pay the interest on all the bonds they issued under this article and to create a sinking fund for the payment of the principal (section 1833, *Ib.*). An ordinance or resolution of this board, passed at or before the issuance of the bonds, providing for the collection of such an annual tax until the bonds and coupons were paid, would have complied with the provision of the constitution. If this was not passed it was not from lack of power in the board, but from failure on its part to exercise the power with which it was vested in the manner provided by the constitution.

“It is this difference between the inadequate exercise of ample power and the total absence of power to be exercised, that widely separated this case from *Dixon Co. v. Field*, 111 U. S. 83; 4 Sup. Ct. 315; *Northern Bank of Toledo v. Porter Tp. Trustees*, 110 U. S. 608; 4 Sup. Ct. 254; *McClure v. Tp. of Osgood*, 94 U. S. 429; *Lake Co. v. Graham*, 130 U. S. 674; 9 Sup. Ct. 654; *Nesbit v. Independent Dist.*, 144 U. S. 610, 617; 12 Sup. Ct. 746; *Sutcliffe v. Commissioners*, 147 U. S. 230-35; 13 Sup. Ct. 318; and *Hedges v. Dixon Co.*, 150 U. S. 182, cited by counsel for defendant.”

The court further said, “that an estoppel may arise in a proper case upon a recital that an act has been performed which was required by a constitution, as well as upon the recital of the performance of an act required by statute.”

§ 208. *Same.*—In the case of *Quaker City v. Nolan*, 59 Fed. Rep. 660, in suit brought on bonds which recited that they were issued pursuant to the enabling statutes which were referred to by title and date of approval, but contained no other recital, the defence was that no sinking fund has been provided when the bonds were issued as required by the constitution of Texas. The court held the bonds to be void for this reason, and said incidentally that no recital would estop the municipality from pleading the non-performance of the constitutional provision. It will be observed that in this latter case the

constitution of the State made void all debts if the provision was not complied with.¹

The effect of recitals in the bond, when the municipality has power to issue the same, as an estoppel against the corporation pleading as a defence the non-performance of precedent conditions and requirements or the falsity of the recitals, being now so well settled by the adjudication of the Federal as well as the State courts, it is not deemed necessary to pursue the subject further in this particular branch of the question. The reader will find in many other parts of this work the subject incidentally referred to.²

§ 209. **By whom the question of performance of conditions precedent shall be decided.**—The question in each case has been, and ever will be, was it the intention of the statute authorizing the issue of municipal bonds, or other municipal paper, to endow the common council, or other legislative body of a municipality, or the officers issuing the bond or other paper, to adjudge that the conditions precedent to the issue or the other requirements necessary to be done at or before the issue of the paper have been performed, and that the findings of such tribunal shall determine the question, once for all, between the

¹ See § 137.

² In the following cases the recitals in the bonds were held to estop the municipality from showing the non-performance of precedent conditions. *Mercer Co. v. Hackett*, 1 Wall. 83; *Gelpcke v. Dubuque*, 1 Wall. 175-203; *Rogers v. Burlington*, 3 Wall. 351; *Marshall Co. v. Schenck*, 5 Wall. 772; *Bissel v. Jeffersonville*, 27 How. 287; *Moran v. Miami Co.*, 2 Black. (U. S.) 722-24; *Van Hestrup v. Madison City*, 1 Wall. 291; *St. Joseph Township v. Rogers*, 16 Wall. 644; *Moultrie v. Savings Bk.*, 92 U. S. 631; *Town of Venice v. Murdock*, 92 U. S. 494; *Johnson Co. v. Thayer*, 91 U. S. 631; *Warren Co. v. Marey*, 97 U. S. 96; *Walnut Tp.*

v. Wade, 103 U. S. 674; *Moultrie Co. v. Fairfield*, 105 U. S. 379; *Northern Bank v. Porter Township*, 110 U. S. 608; *Smith v. Clark Co.*, 54 Mo. 58; *Bernard's Tp. v. Morrison*, 133 U. S. 523; *Shorter v. Rome*, 52 Ga. 621; *National Life Ins. Co. of Montpelier v. Board of Ed. of Huron*, 62 Fed. Rep. 778; *Coler v. Rhoda Sch. Tp. of Charles Mix Co.*, 63 N. W. R. 158; *Risley v. Village of Howell*, 64 Fed. Rep. 453; *Coler v. Dwight Sch. Tp.*, 3 N. D. 249; *Coffin v. Board of Com'rs of Kearney Co.*, 57 Fed. Rep. 137; *Board of Com'rs of Kingman Co. v. Cornell University*, 57 Fed. Rep. 149; *Board v. Randolph*, 89 Va. 614; *Fulton v. Town of Riverton*, 42 Minn. 395.

municipal corporation and the *bona fide* holder of the paper issued, after such a determination, when the paper recites performance of all such necessary prior conditions and requirements ?

When the statute in express terms provides that these questions are to be determined by the officers named therein, and their determination shall be final and conclusive, there is no difficulty in arriving at a proper conclusion in a given case ; but when the fact whether or not this determination is to be passed upon by the officers or body authorized to issue the paper is to be implied from a reading of the whole statute, then the question is debatable and has given rise to numerous decisions in the Federal and State courts.

The very question under discussion arose for the first time in this country in the case of *Knox Co. v. Aspinwall*.¹

In that case the defence on the part of the county was that the notice of election was not given by the officers designated by the enabling statute. The court by Nelson, J., said : "Who is to determine whether or not the election has been properly held and a majority of the votes cast in favor of the subscription ? . . . Is it to be determined by the court in a collateral way, in every suit upon the bond or coupon attacked, or by the board of commissioners, as a duty imposed upon it before making the subscription ? . . . The right of the board to act in the execution of the authority is placed upon the fact that the votes had been cast in favor of the subscription ; and to have acted without first ascertaining it, would have been a clear violation of the duty ; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself as no other tribunal was provided for the purpose. The board was one from its organization and general duties, fit and competent to be the depository of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested by the highest functions concerning its general police and fiscal interest. . . . We

¹ 21 How. 539.

do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previous to the execution of the power and before the rights and interest of third persons had attacked, but after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent purchasers, it would be too late, even in a direct proceeding, to call it in question. Much less can it called in question, to the prejudice of a *bona fide* holder of the bonds in this collateral way."

The bonds were in this case issued by the same officers who were to determine whether the prior conditions were performed.

§ 210. **Same.**—In the case of *Town of Coloma v. Eaves*, 92 U. S. 484, decided in the October term, 1875, the doctrine of *Knox Co. v. Aspinwall* was attacked with great vigor in the opinion of the dissenting judges, but the majority of the court upheld the doctrine of the former case.

The bonds in this latter case contained the following recitals :

"This bond is issued under and by virtue of a law of the State of Illinois, entitled 'An act to incorporate the Chicago and Rock River Railroad Company,' approved March 24, 1869, and in accordance with a vote of the electors of said Township of Coloma, at a regular election held July 28th, 1869, in accordance with said law and under a law of the State of Illinois entitled 'An act to fund and provide for the paying of the railroad debts of counties, townships and cities, in force April 16th, 1860.'"

The bonds were signed by the supervisors and town clerk, who were designated in the statutes as the officers to execute the bonds "if it should appear" that a majority of the legal voters of city, town or township voting had voted for subscription. Upon the question of the authority of these officers to decide that the conditions precedent had been complied with, Mr. Justice Strong, delivering the opinion of the court sustaining the validity of the bonds, said : "At some time or other it is to be ascertained whether the directions of the act have

been followed ; whether there was any popular vote ; or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly invested somewhere and once for all, and the only persons spoken of who have any duties to perform respecting the election and action consequent upon it are the town clerk and supervisor, or other executive officer of the city or town. It is a fair presumption, therefore, that the Legislature intended that these officers, or one of them at least, should determine whether the requirements of the act prior to the subscription to the stock of the railroad company had been met.

“ ‘ If it should appear, ’ the act said. Appear when ? Why, plainly before the subscription was made and the bonds were executed, not afterwards. Appear to whom ? In regard to this there can be no doubt. Manifestly not to a court after the bonds had been put on the market and sold, and when payment is called for, but if it shall appear to the persons whose province it was made to ascertain what had been done preparatory to their own action, and whose duty it was to issue the bonds if the vote appeared to them to justify such action under the law.

“ These persons were the supervisor and town clerk. Their right to issue the bonds was made dependent upon the appearance to them of the performance of the conditions precedent.

“ It certainly devolved upon some person or persons to decide this preliminary question, and there can be no doubt who was intended by the law to be the arbiter.”

Mr. J. Strong, referring to the rule laid down by Judge Dillon ¹ on this subject, further said :

“ Where the legislative authority has been given to a

¹ Dillon on Mun. Corp. Vol. 1. has been complied with, then it (4th ed.) § 523. “ If upon a true may well be that their recital of construction of the legislative enactment conferring the authority, their determination of a matter *in pais* which they are authorized to the corporation or certain officers, decide will, in favor of the bondholder or a given body or tribunal, are holder for value, bind the corporation invested with power to decide whether the condition precedent.”

municipality or to its officers to subscribe for the stock of a railroad company and to issue municipal bonds in payment, but only upon some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the conditions precedent have been complied with, their recital that it has been made in the bonds issued by them is conclusive of the fact and binding upon the municipality, for the recital is a decision of the fact by the appointed tribunal."

§ 211. **Recital by the officers authorized to execute the bonds sufficient.**—In the case of *Warren v. Marcy*, 97 U.S. 96, 104, the bonds were executed by the clerk of the board of supervisors under their order and direction and recited that they were issued "in conformity with a vote of the electors of said county cast at an election held on the 23d day of September, 1869."

Mr. Justice Bradley, who delivered the opinion of the court, said: "We have substantially held (referring to former cases) that if a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified upon the face of the bonds themselves by the authorities whose primary duty it is to determine it. Now that is the case here. The bonds are executed by the board of supervisors, or, which is the same thing, by *their clerk under their order and direction*.

"They certify on their face that they are issued in conformity with the vote of the electors of said county, cast at an election held on the 23d day of September, 1869.

"*This, according to the cases, is a sufficient authentication of the fact that an election was duly held, to protect a bona fide holder for value.*"

It will be seen from the above case that the execution of the bonds by the clerk, under authority of the board of supervisors, estopped the county from setting up as a

defence the non-performance or irregular performance of prior conditions.

It does not appear that the clerk was authorized to make the recitals or execute the bonds containing recitals, but the opinion rests upon the fact that the bonds he did execute pursuant to his authority as agent of the board contained the said recitals.

In another case,¹ it appeared that the common council of the city was authorized by the Legislature to subscribe for the stock in a railroad company and issue bonds for the subscription on petition of three-fourths of the legal voters of the city.

The council adopted a resolution to subscribe, reciting in the preamble that more than three-fourths of the legal voters had petitioned for it, and authorized the mayor and city clerk to sign and deliver the bonds for the sum subscribed. The bonds contained recitals that they were issued by authority of the city council, and that three-fourths of the legal voters had petitioned for the same as required by the charter.

In a suit by an innocent holder on unpaid coupons, it was held inadmissible for the city to show that three-fourths of the legal voters had not signed the petition, that the recitals, as well as the records of the proceedings, estopped such a defence. In this case it will be observed the bonds were executed by the mayor and city clerk under authority of the common council.

In *Oregon v. Jennings*, 119 U. S. 74, the bonds issued referred to the act under which they were issued. The issue was submitted to a vote of the people; the terms of the vote were that the bonds should not be issued and the vote should be void unless the road was completed by a day specified. The road was not completed by that day. The court, in holding the bonds to be valid in the hands of a *bona fide* holder, said: "Within the numerous decisions of this court upon the subject, the supervisors and town clerk, they being named in the statute as the officers to sign the bonds and the 'corporate authorities' to act for the town in issuing them, were the persons

¹ *Bissell v. Jeffersonville*, 24 How. (U. S.) 287.

interested with the duty of deciding, before the issue of the bonds, whether the conditions determined at the election existed, if they have certified to that effect in the bonds, the town is estopped from asserting as against a *bona fide* holder that the conditions prescribed by the popular vote were not complied with. They state in each bond that the faith, credit and property of the town are by the bond solemnly pledged for the payment of the principal and interest named in it, under authority of the act of March 30th, 1869, reciting its title, and that the sixty bonds amounting to \$50,000 are the only bonds issued by said town of Oregon under and by virtue of said act."

§ 212. **When officers not authorized to adjudicate.**—When the enabling statute requires that certain facts shall exist, as for instance the assessable value of the real estate, or the assent of a certain number of the legal voters at the last election, and points to the public records from which all the facts may be ascertained and which are open to the inspection of the general public as fully as to the officers authorized to issue the bonds, in such cases the officers to issue the bonds are not a tribunal to decide whether or not the facts so ascertainable exist or not before making the issue, and their recitals that the facts exist which permit the issue will not estop the municipality from proving them to be false.¹

And in some cases it has been held that unless the existence of the particular facts upon which the issue of bonds is to be made rests in the peculiar knowledge of the officers authorized to make the issue, or unless they have means of knowing the facts not open to the public generally, the officers are not a tribunal to pass upon and determine conclusively the existence of the necessary facts upon which the issue may be made,² except when the statute directs them to pass upon the question in express words or by necessary implication.³

¹ Dixon Co. v. Field, 111 U. S. 84; Quaker City Nat. Bk. v. Nolan Co., 74; Coloma v. Eaves, 92 U. S. 484; 59 Fed. Rep. 660. See §§ 221, 225. Evansville Co. v. Evansville, 15 Ind. 395; Dill. on Mun. Corp. § 523.
² Mutual Benefit L. Ins. v. Elizabeth, 42 N. J. L. 235; Knox Co. v. Aspinwall, 21 How. 529.

And it is a rigid rule that a municipal corporation will not be estopped by recitals, declarations, or public records of agents or public officers who are not authorized to make them.¹

§ 213. **What officers may make the recitals.**—The recitals in the bond or other municipal paper must be made by the officers or board charged with the duty of issuing the paper and determining whether the prior conditions and preliminary requirements have been performed,² or the agents of such officers or board, who themselves must be officers of the municipality.

Sometimes the officers who are to execute the bonds are named in the enabling act, but the officers when not so named must be directed by either the ordinance or resolution of the body authorized to issue the paper, and by their official title, to execute the paper by and on behalf of the municipality. The bond usually recites

¹ *Brown v. Bon Homme Co.*, 46 N. W. Rep. 173; *Bank v. Bergen Co.*, 115 U. S. 384; *Davies Co. v. Dixon*, 117 U. S. 657; *Cagwin v. Hancock*, 84 N. Y. 583; *Hudson v. Winslow*, 35 N. J. L. 437; *Williams v. Roberts*, 88 Ill. 11.

In *Chisholm v. Montgomery*, 2 Woods (U. S.) 584, Mr. Justice Bradley said:—

“The plea that the city is estopped by the act of its officers, by the resolutions of the city council, or by the negotiable form or matter in the bonds themselves, from denying the authority of such officers to pledge the faith of the city in aid of said plank roads, and to issue the bonds in question, cannot be maintained. Public officers cannot acquire authority by declaring that they have it. They cannot thus shut the mouth of the public whom they represent. The officers and agents of private corporations, entrusted by them with the management of their own business and property, may estop their princi-

pals, and subject them to the consequences of their unauthorized acts. But the body politic cannot be thus silenced by the acts or declarations of its agents. If it could be, unbounded scope would be given to the speculations and frauds of public officers. I hold it to be a sound proposition, that no municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it.

“Finally, the plea that the plaintiffs were *bona fide* holders of the bonds cannot avail where the defence is want of power to issue them. Of this defect the plaintiffs were bound to take notice. Had the power to issue the bonds existed, and had the question been whether certain preliminary conditions had been complied with, the plea might, under certain conditions, have been a good one.”

² *Gibbs v. School Dist.*, (Mich.) 59 N. W. R. 294.

that the municipality has caused it to be executed by the officers who execute it and to have the corporate seal affixed.

Justice Matthews, in *Dixon Co. v. Field*, 111 U. S. 94, said :

“ If the officers authorized to issue the bonds upon a condition are not the appointed tribunal to decide the facts which constitute the condition, their recital will not be accepted as a substitute for proof.

“ In others words, where the validity of bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject.”

It is not necessary that the enabling act should in express terms designate the officers or body who are to decide whether or not the preliminaries have been complied with, and as said in *Bernards Township v. Morrison*, 133 U. S. 523, “ Express direction and authority for commissioners or other officials to decide that preliminary conditions have been complied with, are seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named.”

Where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with, their recital that it has been made in the bonds issued by them and held in the hands of a *bona fide* holder is conclusive of the fact and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal.¹

§ 214. **Same.**—The recital in the bond of compliance with the conditions precedent in order to bind the cor-

¹ *Town of Coloma v. Eaves*, 92 U. S. 484.

poration must purport to come from some officer or board charged by law with the duty of ascertaining the fact that the conditions precedent have been fully performed,¹ as for example from the officials signing the bonds on behalf of the corporation.² When there is no express designation of the officer to pass upon this question, then the recital must come from those officials to whom full control is given.³ This power cannot be delegated by the corporation to others than its own officers.⁴

From the opinion of Mr. Justice Bradley in *Town of Coloma v. Eaves*, it would appear that the bond containing the recital, in order to work an estoppel, should be executed by the same person who was authorized to pass upon the question of performance of prior conditions and authorized the issue of the bonds. He said :

“ But if the law required a condition precedent, such as a vote of taxpayers, and a supervisor, judge of probate or other officer is designated to ascertain whether the vote has been given, and he is also the officer to execute the bonds, and he does execute the bonds which contain a recital that the vote has been given, then the *bona fide* purchaser need go no further. He has a right to rely on the statement as a determination of the question.” But in a later case he modified his former opinion and said : “ The holder in good faith has the right to assume that

¹ *Humbolt v. Long*, 92 U. S. 612.

² *Oregon v. Jennings*, 119 U. S. 74 ; *Town of Andes v. Ely*, 158 U. S. 313.

³ In the case of *Inhabitants of the Township of Bernards v. Morrison*, 133 U. S. 523, the court held that the fact that the commissioners were special officers appointed for the purpose of issuing the bonds, by the court did not make their acts less binding. That as they were given by the act, after their appointment, full control over the issue, it was to be conclusively presumed that the conditions precedent upon which they were to issue the bonds, had been duly and regu-

larly performed. That their recitals in the bonds estopped the township from setting up as a defence irregularity in the proceedings.

The defence sought to be interposed being that the consent of a majority of the taxpayers had not been given, that the affidavit of the assessor that the proper consent had been obtained was not true, and also that the commissioners who issued the bonds did not borrow money upon them, but disposed of them without lawful consideration.

⁴ *Jackson Co. v. Brush*, 77 Ill. 59.

such preliminary proceedings have taken place, if the fact be certified upon the face of the bonds themselves, by the authorities whose primary duty it is to determine it. Now that is the case here. The bonds are executed by the board of supervisors, or, which is the same thing, by their clerk under their order and direction."

§ 215. **Author's conclusions as to what officers may make the recitals.**—In some of the cases heretofore referred to, the officers who signed the bonds, and under what authority, is set out so as to show who executed the bonds containing the recitals. It will be found that the officers who executed the bonds containing the recitals were directed and authorized to execute them, either by the statute authorizing their issue, or by the board or body authorized by statute to make the issue, and in no case does it appear, when the bonds are executed by officers other than those who are authorized by statute to issue them, that they were authorized to make any recitals therein. It would therefore appear that when the officers who are directed to execute the bonds, either by the enabling statute or some resolution or ordinance, are not the same officers who are authorized to issue the bonds, that if such ministerial officers execute bonds containing recitals of prior performance or other necessary requirements, or such recitals as will lull the suspicion of an innocent holder, such recitals will estop the municipality to deny their truth to the same extent as if made by the officers, board or body empowered to issue the bonds.¹

Such recitals, if sufficient, so made will estop the municipality as to any act which the officers, board or body should have done up to and including the last necessary act to be done by the body authorized to make the issue, but it will not include or cover any act, the performance of which must be done after the board or body authorized to issue the bonds have performed all the requirements which the law required them to perform, unless the omitted act was made the duty of the officers executing the bonds to perform.

A case in point is that of National Bank of Commerce

¹ See note to § 208 for citation of cases.

v. Town of Granada, 54 Fed. Rep. 100. The bonds were executed by the mayor and clerk of the town, they being named in the enabling act to execute them; they were also at a meeting of the town trustees ordered to execute the bonds. The defence was that the ordinance submitting the question of the issue to the voters was never published as required by a general statute relating to ordinances and by-laws.

Each bond contained a recital that it was issued "under ordinance of the city council of the city of Granada adopted," etc.

The court said: "If the recital in this case had stated in terms that the ordinance has been published it would not have estopped the town because neither the mayor, clerk, nor both, were invested with authority to determine that question, and anything they might say or certify on the subject, save as witnesses in court, would not be evidence anywhere or bind any one. . . . The law does not refer the public to those officers or to either of them for information of the publication of town ordinances, and their statements upon that subject have no more binding force than those of any other citizen of the town."

§ 216. **Recital of wrong act.**—It sometimes happens through carelessness or otherwise that the bonds recite, as the authority for their issue, the wrong act, or the act is misstated in some of its parts; such bonds are nevertheless valid and binding upon the corporation, if it, in fact, has the legal authority to issue bonds for the purpose for which such bonds were issued.¹

Sometimes the bonds are issued by mistake in accordance with a law which has been repealed. Such bonds

¹ Knox Co. v. Ninth Nat. Bank, *incorporate cities*," etc., is immaterial provided the act authorize the issue of the bonds. Atchison Board of Ed. v. DeKay, 118 U. S. 491. A mere misrecital of the title of the enabling act in the bond, as where a bond recited that it was issued under authority of an act entitled "An act to *organize* cities," etc., when it should have been, "An act to

have been held valid when it appeared that they had been issued in substantial compliance with other laws in force, but the holder of such bonds cannot be aided by recitals, inasmuch as they rely upon the laws not referred to in the bonds.¹ But if the bonds, in addition to the wrong act, recite some other fact upon which their issue was authorized, as where, after reciting they were issued pursuant to an enabling act, reciting it, which was the wrong act, they further recite that they were also issued "in pursuance to the vote of the electors of Anderson County, September 13th, 1869," it is held that such recital is equivalent to the statement that the vote was a lawful one, regular in form, and such as the law then in force required in respect to prior notice.²

In a suit on bonds where the question is under which of two acts they were issued, their validity being admitted, it is unnecessary to prove every separate step which otherwise might be required to show the legality of the issue for which the plaintiff contends.

Any statement on the records of the county may be evidence, and from all the facts and circumstances it is to be determined under which act the municipality proceeded.³

Where the wrong act is recited in the bond through inadvertence, but the municipality has power to issue the bonds, it may be shown by the proceedings of the municipality that all the necessary steps under the law which authorized such issue has in fact been performed, and such bonds will be valid in the hands of *bona fide* holders ;⁴ but where the bonds recite an act, the prior conditions of which have not been performed, and it is sought to hold them valid under some other act not referred to in the bonds, the proceedings prior to the issue must show that the preliminary conditions have in fact been performed pursuant to such non-recited act, otherwise

¹ Johnson Co. v. January, 91 U. S. 202 ; Gilson v. Dayton, 123 U. S. 59.

³ Knox Co. v. Ninth Nat. Bk., 147 U. S. 91.

² Anderson Co. v. Beal, 113 U. S. 239.

⁴ Anderson Co. v. Beal, 113 U. S. 237.

they will be held void in the hands of even a *bona fide* holder.¹

When the act recited is unconstitutional the bond will still be valid, if there be some other statute which, though not recited, authorizes the issue of the bonds for the stated purpose and the prior conditions under the non-recited act have been complied with.²

¹ Crow v. Oxford, 119 U. S. 215.

² C. B. U. P. R. R. Co. v. Smith,
23 Kan. 745.

CHAPTER XV.

FURTHER EFFECT OF RECITALS—WHEN PURPOSE OF ISSUE MUST BE RECITED—EFFECT OF RECITAL OF THE PURPOSE —BONDS ISSUED IN EXCESS OF THE STATUTORY AND CONSTITUTIONAL LIMIT—RECOVERY UPON VOID BONDS.

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217—When purpose of the issue must be recited in the bond—Bond void unless purpose recited.

218—Effect of recital of purpose of the issue of the bonds.

219—Doctrine extended—When ordinance need not recite purpose if the enabling act is recited—Cases.

220—Comments on the cases.

221—Bonds issued in excess of the statutory limit—When the bonds will be held valid—Valid if the amount of issue is to be determined by the officers and they make proper recitals in the bonds—Recital of the enabling act sufficient in such cases—Exceptions.

222—Cases illustrating general doctrine of estoppel by recitals applied to such bonds.

223—If there be no recitals in the bonds, then the records of the corporation must be relied on—When no recitals, purchaser is charged with all that the records of the corporation relative to the issue disclose.

224—General rule as to recitals—Exceptions—A few cases

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hold that the mere execution of the bonds estop the corporation—Case in New York.

225—Bonds issued in excess of the constitutional limitation—Effect of recitals—Greater care required of purchasers than when the limitation is statutory.

226—Attitude of the Federal courts—Early cases intimated that if the bond contained proper recitals the corporation would be estopped.

227—Same—Cases holding bonds invalid.

228—When the purchaser must inquire for himself—If the limit is based upon some public record and the bond discloses the amount of the issue, the bond will be void in all hands—Cases illustrating the doctrine.

229—Same—Cases.

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bonds which exceed the constitutional limit.

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234—Cases illustrating the position of the courts.

235—Same.

236—Same—The amount within the limit may be divided *pro rata* among the holders of the bonds.

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237—Money must have been applied to a lawful municipal purpose by the direction of the corporation, otherwise there can be no recovery—Author's conclusions as to the law.

238—No recovery on void unconstitutional bonds—Exceptions.

239—No relief in equity if the bonds exceed the constitutional limit—Cases to the contrary.

§ 217. **When purpose of issue must be recited in the bonds.**—Usually the bonds recite the purpose for which they are issued, and recite the title of act of the Legislature and of the ordinance pursuant to which they are issued.

They need not contain recitals¹ unless the law requires that the purpose of the issue shall be recited in the bond itself, and when *such* bonds fail to disclose on their face the purpose for which they are issued, they are not negotiable, so far, at least, as to cut off defences against even innocent holders. A case illustrating the rule is that of *Barnett v. Dennison*, 145 U. S. 135.

In this case the charter of the city under which the bonds were issued required that bonds should specify for what purpose they were issued. The bonds in question were issued pursuant to an ordinance of the city for the purpose of redeeming the outstanding city scrip or other indebtedness, the bonds referred to the ordinance giving the date of its passage and approval, but not its title or contents or purpose, and the bonds did not specify for what purpose they were issued. The bonds were, in fact, issued for a purpose entirely different from that specified in the ordinance, viz. : in aid of a refrigerator car com-

¹ See § 122.

pany which had agreed to erect at Dennison its plant, which the company failed to do.

The court said in view of the requirement of the said statute : "It is certainly a reasonable requirement that the bonds issued shall express, upon their face, the purpose for which they were issued.

"In any event it was a requirement for which the purchaser (the plaintiff) was bound to take notice, and if it appeared upon their face they were issued for an illegal purpose they would be void. If they were issued without any purpose appearing at all on their face, the purchaser took the risk of their being issued for an illegal purpose, and if that proved to be the case, they are as void in his hands as if he had received them with express notice of their illegality."

It was held that bonds purporting to be "refunding bonds" issued to take up "bonds falling due" sufficiently complied with the Michigan statute requiring each municipal bond to show upon its face "the class of indebtedness to which it belongs and from what fund it is payable."¹

Ordinarily the recital of the fact that the bonds were issued in pursuance of a certain ordinance would be notice

¹ *City of Cadillac v. Woonsocket Int.*, 58 Fed. Rep. 935. On this subject see *State v. School Dist.*, 24 Kan. 237; *Young v. Camden Co.*, 19 Mo. 369.

Where the charter of the city of Indianapolis authorized the council to make "original loans" with the limitation, that "such loans may be made only for the purpose of procuring money to be used in the legitimate exercise of corporate powers of such city and for the payment of legitimate corporate debts," the court, in *Coffin v. City of Indianapolis*, 59 Fed. Rep. 221 said : "This limitation evidently means that when the city proposes to borrow money the

ordinance shall state the purpose of the loan, in order that it may appear that the money procured is to be used in the legitimate exercise of corporate power, or for the payment of legitimate corporate debts. If the city may issue and sell its bonds to raise money without stating any lawful purpose for which the money is to be used, the bonds would be valid if the money was used for a legitimate corporate purpose and invalid if the money was illegitimately used. Such a construction would place upon the purchaser of the bonds the burden of seeing to the rightful application of the money if he would maintain their validity."

that they were issued for a purpose specified in such ordinance, and the city would be estopped to show the fact to be otherwise ;¹ but where the statute requires such purpose to be stated upon the face of the bonds, it is no answer to say that the ordinance authorized them for a legal purpose, if in fact they were issued without consideration and for a different purpose.²

§ 218. **Effect of recital of purpose of the issue of the bonds.**—The effect of the recital in the bond of the purpose for which it is issued will estop the municipal corporation to plead that it is issued in fact for a private or unlawful purpose, but in order to work an estoppel in such cases the corporation must have had authority to issue the paper for the purposes recited at the time issued, and the statute or statutes which authorized the issue must be recited on the face of bond or other paper. As the subject is an interesting one the important cases illustrating the doctrine are given at length.

The earliest and leading case on this subject is that of *Hackett v. Ottawa*, 99 U. S. 86.

In this case the city of Ottawa, after an affirmative vote of the qualified electors of the city ratifying an ordinance of the city council to provide for a loan for municipal purposes, issued its bonds in the sum of \$60,000. The bonds recited the ordinances which expressed that the loan was for municipal purposes. The recitals of the ordinances were as follows : " And also in accordance with a certain ordinance passed by the city council of said city on the fifteenth day of June, A. D. 1869, entitled ' An ordinance to provide for a loan for municipal purposes,' which ordinance was ratified by a majority of all the qualified voters at an election holden on the twentieth day of July, A. D. 1869, and in conformity with an ordinance passed by the city council of said city on the thirtieth day of July, A. D. 1869, entitled ' An ordinance to carry into effect the ordinance of June 15th, 1869, entitled An ordinance to provide for a loan for municipal

¹ *Ottawa v. National Bank*, 105 U. S. 342.

² *Barnert v. Dennison*, 115 U. S. 135.

purposes.” The bonds also recited that they were “issued by the city of Ottawa by virtue of the charter of said city,” and the sections of the charter were referred to.

It was contended on the part of the city that the bonds were invalid because the purpose for which the bonds were to be used was not a public one, and that the ordinances disclosed that fact. The court held the bonds to be valid upon the recitals contained on their face, and did not pass upon the question whether the purpose for which the bonds were issued was a public or private one. The court held the plaintiff to be a *bona fide* holder for value without notice and on the subject of estoppel said :

“ For all corporate purposes, as we have seen, the council, if instructed by a majority of the voters attending at an election for that purpose, had undoubted authority under the charter to borrow money upon its credit and to issue bonds therefor. The bonds in suit, by their recital of the title of the ordinances under which they were issued, in effect assured the purchaser that they were to be used for municipal purposes, with the previous sanction duly given of a majority of the legal voters of the city. If he would have been bound under some circumstances to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the representation upon the face of the bonds that the ordinance under which they were issued, were ordinances ‘providing for a loan for municipal purposes.’ Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part and induce the purchaser to omit an examination of the ordinances themselves. It was substantially a declaration by the city, with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes.

“ The city is therefore estopped by its own representations to say, as against a *bona fide* holder of the bonds, that

they were not issued or used for municipal or corporate purposes. It cannot now be heard, as against him, to dispute their validity. Had the bonds upon their face made no reference whatever to the charter of the city or recited only those provisions which empowered the council to borrow money upon the credit of the city, and to issue bonds therefor, the liability to the city could not be questioned. Much less can it be questioned in view of the additional recital in the bonds that they are issued in pursuance of an ordinance providing for a loan for 'municipal purposes,' that is, for purposes authorized by its charter."

In the subsequent case of *Ottawa v. National Bank of Portsmouth*, 105 U. S. 343, on a suit on a part of the same issue of bonds, the former case was approved.

In the case of *Ottawa v. Carey*, 108 U. S. 110, a part of the same issue of bonds were held to be invalid because the holder thereof took them with full knowledge of infirmities, the bonds being donated to private persons as a bonus for developing the water power in the city or its vicinity for manufacturing purposes.

In these cases the bonds were signed by the mayor and clerk, and their authority to execute them is not disclosed by the reported cases.

§ 219. **The doctrine extended.**—The case of *Risley v. Village of Howell*, 64 Fed. Rep. 453, not only illustrates the point in question but also illustrates the construction to be placed upon all the recitals in a bond in their effect as an estoppel, and therefore is given at some length.

The bonds were executed by the president and recorder of the village, they being named in the enabling act to execute them.

The bonds on their face recited the act under which they were issued, and the further fact that they were also issued "under the ordinance of the village of Howell passed August 12th, 1885;" they also each contained on their face the words "Improvements bonds."

The village had power under the act to issue bonds for

the purpose of obtaining money to make public improvements in the village.

Under a resolution of the common council, the question was submitted to the voters whether the village should issue \$20,000 of bonds under said act for the purpose of obtaining money to make public improvements, and the vote decided the question in the affirmative. Afterwards the common council of the village passed the ordinance referred to in the bonds, which provided for the issue of \$20,000 of bonds, but unlawfully directed that they be made payable to the agent (Ashley) of a railroad company, or bearer, and to be used to aid a railroad. (The constitution of the State of Michigan prohibited such aid.)

Some of the bonds found their way into the hands of Risley, the plaintiff, who was a *bona fide* purchaser without notice, other than that contained on the face of the bonds themselves. The court held the bonds to be valid in his hands, as the village had power to issue the bonds, and that the recital of the ordinance did not put him on inquiry to ascertain its scope and object, and that the purchaser could presume that the ordinance was a lawful one and passed in conformity with the enabling statute. On the subject of the effect of the recitals in the bonds in question, the court said :

“ In order to determine what effect should be given to this part of the recitals in the bonds, reference must be had to the whole instrument under the just and familiar rules of construction. In one part of each of the bonds it was represented that it was an ‘ improvement bond.’

This taken in connection with the subsequent reference to the statute meant that it was a bond used to provide means for a public improvement.

In another place it was represented that the bond was issued under and by virtue of a special act of the State of Michigan entitled ‘ An act to authorize the village of Howell to make public improvements in the village of Howell, being act No. 248 of the local acts of 1885, of the Legislature of the State of Michigan, approved February 25th, 1885, and also under an ordinance of the village of

Howell passed August 12th, 1885.* What was the meaning of this representation?

To say that a thing is done 'under and by the authority of a statute referred to,' is equivalent to saying that it is 'done in conformity with it and authorized by it.' . . . Bringing all the recitals of the bonds together they amount to a representation that they were issued to raise money to defray the expenses of a public improvement of a kind to be determined by the common council, that the requirements of the law had all been complied with, and that an ordinance in conformity with the law had been passed directing their issuance: for if the ordinance were not in conformity with the law, inasmuch as it preceded the issuing of the bonds, it falsified the preceding statement that the bonds were issued in conformity with the statute."

This case was decided in the court below, 57 Fed. Rep. 544, against the holder of the bonds, the court holding that the reference to the ordinance was notice of its provisions and the purchaser was bound to inspect the same, and that had he done so he would have learned that the purpose of the issue was an unlawful one.

In a recent case¹ decided by the Supreme Court of Alabama, where it appeared the town had legislative authority to issue bonds for waterworks, it passed an ordinance to issue bonds for water works and also to provide for electric lights. The bonds recited the enabling statute and also referred to the ordinance, but did not give its title or purpose.

The town sought to show that the bonds were illegal, because issued for the electric lights, but the court held the town estopped by its recitals in the bonds from setting up the illegal purpose.

§ 220. **Comments on the last two cases.**—It seems to the author that the last two cases referred to above are a step in advance of the Ottawa cases. In the Ottawa cases the ordinance recited the purpose of the issue of the bonds, and this purpose was in accord with the recited statute which authorized the issue of the bonds for the

¹ Town of Brewton v. Spira, 17 S. R. 660.

purpose named in the recited ordinance, but in the cases of *Risley v. Village of Howell* and *Brewton v. Spira* the purpose of the ordinance referred to in the bonds was not disclosed at all, and whether public or private or in accord or conflict with the recited enabling statutes could only be ascertained upon inspection of the ordinances, therefore they and the *Ottawa* cases are not parallel ones, and do not rest entirely upon the same reasons to sustain them.

The cases of *Risley v. Village of Howell* and *Brewton v. Spira* rest upon the construction of recitals in municipal paper when construed as a whole, and in addition to the doctrine laid down in the *Ottawa* cases upon the further doctrine, and which they go to establish, that when a bond recites that it is issued pursuant to the enabling statute, and also recites as a further authority for its issue an ordinance or any other fact, which is not inconsistent with the enabling statute recited, and such further recital (although if investigated would lead to the discovery that the bond is invalid) does not disclose that it is not in harmony with the enabling act, such further recital or recitals are to be construed as a part of and consistent with the enabling statute, and as if the further recitals had not been made.

§ 221. **Bonds issued in excess of statutory limit—When the bonds are held valid.**—Municipalities are, in many cases, either by their respective charters, or by the enabling act authorizing the issue of bonds, or by some general act, limited as to the amount of debt they may incur and the amount of bonds or other municipal paper they may issue.

Bonds have been issued in many instances by municipalities, the amount of which, in whole or in part, exceeded the amount fixed as a limit by some statute, and have found their way into the hands of innocent holders, and the question as to the rights of such holders to collect and enforce payment for such bonds has been passed upon in a number of cases.

The doctrine of the courts in cases of this kind is that if the amount of the issue is left to be determined by the municipal officers, or by the officers named in the enabling

act, who are authorized to issue the bonds, and this question is to be determined before the bonds are issued according to the terms of the enabling statute, and although the statute does not in express words place the determination of the question whether the amount of the issue will exceed the limit with the officers authorized to issue the bonds, but that it is the intention of the statute so to place such determination may be gathered from the act,¹ then if the bonds or other municipal paper contain recitals that the issue does not exceed the statutory limit, or merely recites that they are issued pursuant to, or in conformity with, the enabling statute, the municipality will be estopped to set up the fact of such over-issue.²

And when the amount of bonds that can be legally issued is to be determined by the assessment rolls, which are public records, and which are to be used as a basis of calculation in the manner pointed out by the statute which contains the limitation, or by any calculation based on other public records, and the question is to be decided by the officers who are to issue the bonds, their determination and the recitals in the bonds, which is the evidence of such determination, will estop the municipal corporation from setting up as a defence the over-issue,³ but there are a few cases which hold that unless the public records from which the calculation is to be made are peculiarly, if not exclusively, under the control of the officers authorized to determine the question of the amount, or more accessible to them than to strangers, or unless the facts upon which the basis of calculation is to be made are peculiarly within their knowledge, the bonds will be held invalid.⁴

When the issue is in excess of the statutory limit the doctrine of the courts has been to hold the purchaser to

¹ On this subject, see § 209 *et seq.* ³ Humbolt Tp. v. Long, 92 U. S.

² Humbolt Township v. Long, 92 U. S. 612.

U. S. 642; Macey v. Township of ⁴ Mutual B. L. Ins. Co. v. Eliza-
Oswego, 92 U. S. 637; Dill Mun. Beth, 42 N. J. L. 235; Cotton v.
Corp. (4th ed.) § 529 and note; New Providence, 47 N. J. L. 401.
Sherman Co. v. Simon, 109 U. S.

a much less degree of care than when the limitation is a constitutional one.

§ 222. **Cases illustrating the doctrine.**—In order to further illustrate the doctrine of the courts as to the effect of recitals contained in bonds, when they are issued in excess of the statutory limitation, reference is made to some of the cases.

The earliest case in the Federal courts is that of *Marcy v. Township of Oswego*, 92 U. S. 637 ; this is also one of the leading cases on the subject.

In this case the amount of bonds issued was \$100,000, and exceeded in part the statutory limitation. Each bond recited : " This bond is executed and issued by virtue of, and in accordance with, an act of the Legislature of said State of Kansas entitled ' An act to enable municipal townships to subscribe for stock in any railroad and to provide for the payment of the same,' approved Feb. 25th, 1870, and in pursuance of, and in accordance with, the vote of three-fifths of the legal voters of the said township of Oswego at a special election duly held on the 17th day of May, A. D. 1870."

The bonds were each signed by the chairman of the board of county commissioners, and attested by the county clerk under the seal of the county, and each recited that the board had caused it to be executed. The enabling statute also directed the said officers to execute the bonds.

The bonds were, after execution, registered in the office of the State auditor and certified by him in accordance with an act of the Legislature. He certified that each bond had been legally and regularly issued.

The statute provided that the amount of the bonds voted by any township should not be above such a sum as would require a levy of more than one per cent per annum on the taxable property of such township to pay the yearly interest.

The act did not in express terms provide that the county commissioners, who were to issue the bonds, should determine the amount of bonds that could be legally issued by any township under the act. It will be observed that

the bonds contained no statement in direct terms that they were not issued in excess of limitation.

The court held the bonds valid because of the recitals.

Mr. Justice Strong, who delivered the opinion of the court, said :

“The board (of county commissioners) was to order the election if certain facts existed, and only then. It was required to act if fifty freeholders, who were voters of the township, petitioned for the election ; if the petition set out the amount of stock proposed to be subscribed for ; if that amount was not greater than the amount to which the township was limited by the act ; if the petition designated the railroad company ; if it pointed out the mode and terms of payment, of course the board, and it only, was to decide whether these things precedent to the right to order an election were actual facts. No other tribunal could make the determination. So also the subsequent issue of the bonds containing the recitals above quoted that they were issued ‘by virtue of and in accordance with,’ the legislative act, and ‘in pursuance of, and in accordance with, the vote of the township’ was another determination. . . . They are all by the statute referred to the inquiry and determination of the board, and they were all determined before the bonds and coupons came into the hands of the plaintiff ; he was therefore not bound, when he purchased, to *look beyond the act of the Legislature and the recitals which the bonds contained.* . . . In view of these facts and of the decisions heretofore made by this court the question cannot be considered an open one. We have recently reviewed the subject in the case of *Town of Coloma v. Eaves*, and reasserted what had been decided before ; namely, that where legislative authority has been given to a municipality to subscribe for the stock of a railroad company and to issue municipal bonds in payment of the subscription, on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the officers designated to execute the bonds were invested with power to decide whether the contingency had happened or whether the

fact existed which was a necessary condition precedent to any subscription or issue of the bonds, their decision is final in a suit by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive. And this is more emphatically true when the fact is one peculiarly within the knowledge of the persons to whom the power to issue the bonds has been conditionally granted."

In the subsequent case of Humbolt Township v. Long, 92 U. S. 642, the court cited and approved the above case, and said in part :

"There is no essential difference between this case and that. The assessment rolls of the township may have been proper evidence for the consideration of the board of county commissioners when they were inquiring what the value of the taxable property of the county was, but the bonds are not invalid in the hands of a *bona fide* holder by reason of their having been voted and issued in excess of the statutory limit as shown by the rolls. Whatever may be the right of the township as against those who issued the bonds, it cannot be set up against a *bona fide* holder of the bonds that the amount issued was too large, in the face of the decision of the board and their recital that the bonds were issued pursuant to and in accordance with the act of 1870."

§ 223. **Same—If no recitals, then the record must be relied on.**—In the case of Sherman Co. v. Simons, 109 U. S. 735, the suit was on coupons cut from bonds issued by the commissioners of Sherman Co., Nebraska, under a statute of that State approved Feb. 18th, 1875, which authorized the issue of bonds for funding the warrants and orders of the counties named in the act.

The act contained the following provisions :

"Provided that no more of the bonds authorized to be issued by virtue of the act shall be issued than is necessary to pay off and redeem such warrants so outstanding ; and provided further that the said commissioners shall not issue said bonds to exceed in value the amount of said indebtedness up to January 1st, 1875, nor shall said bonds

be negotiated at a less price than eighty-five cents on the dollar."

The defence was that although on January 1st, 1875, there was but \$16,000 of debts, bonds were issued for \$45,000, and also that the bonds were negotiated for less than eighty-five cents on the dollar.

The bonds recited the act, and the court held them to be valid for that reason and the further reason that the records of the commissioners showed they had estimated the debts at \$45,000.

Unless the bonds contain recitals which estop the municipality from showing the over-issue the holder is charged with notice of whatever the records of the proceedings of the officers or body authorized to issue the bonds would disclose. In *Merchants' etc. Bank v. Bergen Co.*, 115 U. S. 384, where bonds were issued in excess of the amount (\$250,000) authorized by the enabling act, Field, J., said: "Any further issue was beyond its authority. Unless, therefore, there is something in connection with the issue to estop the county from contesting their validity they can in no manner bind the county. *In these bonds there are no recitals.* The bank, in taking them, was bound to ascertain whether or not they were authorized. Had it examined the register of bonds issued to take up the matured bonds, which was a public record of the county and open to inspection, it would have learned that the bonds it received were not of the number so authorized."

§ 224. **General Rule—Exceptions.**—While it is the general rule that unless the bonds issued in whole or in part in excess of the statutory limit contain recitals which will, as heretofore shown, estop the municipal corporation to plead the fact of over-issue, the holder must then rely upon the record of the proceedings of the officers or body authorized to issue the bonds and to determine the amount that can be legally issued, in order to show that the question was adjudicated upon and settled and determined, there are cases which hold that where the limit is to be ascertained by the municipal officers from records or data which are peculiarly within the knowledge or con-

trol of the officers, or they have better access to the information than other persons and can ascertain the amount with more certainty than strangers, then the bonds will be held valid in the hands of a *bona fide* holder from the mere fact of their execution and issue.

A case in point is that of *Mutual Ben. Life Ins. Co. v. Elizabeth*, 42 N. J. L. 235. The city was given authority to issue bonds for the amount of assessments ratified and unpaid on a certain day. What assessments were ratified and unpaid on that day could only be ascertained by an examination of the city's books and accounts, and only with reasonable certainty by its officers. Bonds largely in excess of the limit were issued. Whether the bonds contained any recitals does not appear from the case.

The court held the bonds valid in the hands of *bona fide* holders, upon the principle that the purchaser had a right to rely upon the action of the officers issuing the bonds, who thus affirmed that the conditions requisite to their issue existed, and that the amount of the assessments on the day named was peculiarly within the knowledge of the municipal officers.

In another case in the same State, *Cotton v. New Providence*, 47 N. J. L. 401, the limit of the issue of the bonds depended on the valuation of the real property of the township for a certain year, to be ascertained from the assessment rolls for that year. Whether the duplicate assessment rolls were a public record or not was not determined.

The court said : " It is clear that the duplicate in this case, although a public document, was not readily accessible to intending purchasers, but was especially accessible to the township officers and the commissioners entrusted with this power.

" When they *issued* the bonds they averred the issue was within the limit. Construing the act by the rule laid down in the case cited (*Mutual Ben. Life Ins. Co. v. Elizabeth*), the legislative intent that their decisions on this subject should be final appears. The holder of the bonds had a right to rely thereon."

In the above case the bonds were executed by commissioners appointed by the court.

No reference to any recitals in the bonds was made, and the mere fact of their execution was held to be the evidence of the decision of the officers. The ruling in this case was affirmed in *New Providence v. Halsey*, 119 U. S. 336.¹

Where an officer was authorized by a statute of New York to issue certain certificates up to a certain amount and he issued certificates in excess of the limit, and those so issued recited the enabling act, the court held the excess to be invalid and said :

“The proposition that the recitals in the certificates were conclusive upon the facts therein stated cannot be sustained under the decisions of this State. . . . It is settled that one who purchases instruments of the character of those in suit, although he does so in good faith, must see to it that they are authorized by the statute under which they purport to be issued. . . . I know of no authority to the effect that a municipal corporation is not permitted to assert and prove against a *bona fide* holder of its bonds the fact that they were not authorized by any legislative body. . . . When an instrument refers on its face to a statutory power, every holder is made chargeable thereby with notice of the statute and its limitations.”

The court further held that as the recitals were made by the officer who was not authorized to pass upon the question as to whether or not the facts existed which permitted the paper to be executed, the town was not bound by the recitals.²

§ 225. Bonds issued in excess of constitutional limitations—Effect of recitals.—Where the limitation is imposed by the constitution of a State, or by the constitution and a statute, the decisions of the courts have established, it would seem, a somewhat different degree of care on the part of the purchasers than when the limitation is purely statutory. Many of the State consti-

¹ See § 195, and note.

² *Broadway Sav. Inst. v. Town of Pelham*, 83 Hun, 96.

tutions adopted in late years contain restrictions upon the power of their respective Legislatures which curtail the almost absolute powers formerly possessed by those bodies to authorize or permit municipal corporations to become indebted, or in some cases to compel them to contract debts or make internal improvements or grant aid without the consent of the municipal authorities. Principal among such restrictions is that which limits the amount of debt which a municipal corporation may incur or the Legislature authorize. The courts, recognizing the will of the people as expressed through their State constitution, have sought to aid in the enforcement of such limitations, and have, in relation to the question of estoppel by recitals contained on the face of a bond, adopted a much stricter doctrine when the bond is issued in excess of a constitutional limitation than when in excess of a statutory one.

They hold the purchaser to a closer investigation of the facts and records relating to, or in any manner connected with, the incurring of the debt and the issuing of the bonds, when the bonds or other paper are, either in whole or in part, beyond the limitation or standard fixed by the constitution, than when the limitation is a statutory one, and if from such an inspection he could have ascertained that the issue was in excess of the constitutional limitation, the bonds will be declared invalid notwithstanding any recitals, unless the recitals in express terms state that the issue is not in excess of the constitutional limitation, and the amount of the issue of the bonds is not ascertainable from the bond itself.¹

§ 226. **Attitude of the Federal courts.**—That the Federal courts would in a proper case hold a municipal corporation to be so estopped by its recitals in its bonds was strongly intimated in one of the earliest, if not the earliest, case decided by the U. S. Supreme Court, wherein the question of estoppel by recitals to plead such excess arose.

The case is that of *Buchanan v. Litchfield*, 102 U. S. 278. The bonds in this case were issued in excess of the

¹ *Chaffee Co. v. Potter*, 142 U. S. 355.

constitutional limitation of the State of Illinois. Each bond recited that it was issued under authority of "an act of the General Assembly of the State of Illinois entitled 'An act authorizing cities, incorporated towns, and villages to construct and maintain water works,' approved April 15th, 1873, and in pursuance of an ordinance of said city of Litchfield No. 184, and entitled 'An ordinance providing for the issuing of bonds for the construction of Litchfield water works,' approved December 4th, 1873."

The bonds were executed by the mayor and city clerk under authority of said ordinance.

The court held the bonds void in the hands of a *bona fide* holder, because the recitals did not cover the constitutional defect, and on this latter point said :

"Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated in any form that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of authority therein conferred to those municipal corporations whose indebtedness did not, at the time, exceed the constitutional limit, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recital or statement, as to the extent of its existing indebtedness."

The above language intimated that if a proper case were presented to it, the court would hold the corporation issuing the paper estopped to plead the fact that it was issued in excess of a constitutional limitation. No such case apparently came before it until that of *Chaffee Co. v. Potter*, *supra*, which was a case wherein the bonds in express terms recited that they did not exceed the constitutional limitation ; but before referring to the case, it is deemed best to refer to other cases decided by the same court, wherein the bonds upon which, or the coupons cut therefrom, the suit was founded, were issued in whole or in part in excess of the constitutional limit, and which bonds were held void therefore, and the purchasers or holders thereof charged with notice of the fact of the over-

issue, in order that the grounds upon which the bonds in *Chaffee Co. v. Potter* were held valid may be the better understood.

§ 227. **Same—Cases holding bonds invalid.**—The leading case when the issue is in excess of the constitutional limitation, and the one almost always referred to in all subsequent cases, as the grounds upon which the bonds are declared void, and the one which has fixed the duty of purchasers of such bonds, is that of *Dixon Co. v. Field*, 111 U. S. 83.

The bonds in this case were issued in excess of the constitution of Nebraska, art. 12, sec. 3, which limited the power of a county to issue bonds to an amount not exceeding ten per cent of the assessed valuation of the county.

The amount of the issue of the bonds was \$87,000 and exceeded the constitutional limitation.

Each bond disclosed that the total issue was \$87,000, and each contained upon its face the following recital :

“This bond is one of the series of eighty-seven thousand issued under and in pursuance of an order of the county commissioners of the County of Dixon, in the State of Nebraska, and authorized by an election held in said county on the 27th day of December, 1875, and under and by virtue of chapter 35 of the general statutes of Nebraska and amendments thereto, and the constitution of said State, art. 12. Adopted October, 1875.” The defence was that the bonds were issued in excess of the constitutional limitation. The plaintiff contended that the county was estopped by its recitals in the bonds from setting up the defence. Attention is called to the fact that the bonds each recited they were issued under, not only the enabling act but also the constitution of the State, and the article containing in sec. 3 of it the constitutional limitation.

The court held the bonds to be void because issued in excess of the constitutional prohibition.

Mr. Justice Matthews, delivering the opinion of the court, said : “ If the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power,

but by reference to some definite record of a public character, then the true meaning of the law would be, that the authority to act at all depended upon the actual objective existence of the requisite fact as shown by the record, and not upon its ascertainment and determination by any one, and the consequence would necessarily follow that all persons claiming under the exercise of such a power might be put to the proof of the fact made by it a condition of its lawfulness, notwithstanding any recitals.

“In the present case there was no power at all conferred to issue bonds in excess of an amount equal to ten per cent upon the assessed value of the taxable property in the county. In determining the limit of power there were necessarily two factors : the amount of the bonds to be issued, and the amount of the assessed value of the property for purposes of taxation. The amount of the bonds issued was known.

“It is stated in the recital itself it was \$87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated, but *ex vi termini* it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount as fixed by that record that is made by the constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment or determination as to that fact is submitted to the court's officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary to the exercise of their functions and the performance of their duties ; but the information is for themselves alone. All the world besides must have it from the same source and for themselves. The fact as it is recorded in the assess-

ment itself is extrinsic, and proves itself by inspection and concludes all determinations."

§ 228. **When the purchaser must inquire for himself.**—The above case established the doctrine that where the limitation is based upon some public record, as the assessment rolls, and the amount of the debt which may be incurred is a certain per centum thereof or a given rate of taxation based thereon, then any purchaser of bonds or other paper is chargeable with notice of the amount of debt that can legally be incurred, and when that debt is evidenced by municipal paper, which on its face discloses the total amount of paper issued, the purchaser must consult the assessment roll, and from that he must ascertain, at his peril, after examining the constitutional limitation (as every purchaser is bound to know all the laws under which municipal paper is uttered), whether or not the total issue of the paper exceeds the constitutional limit.

The doctrine has been followed in all the subsequent cases when the paper was in whole or in part issued in excess of the constitutional limit.¹ A few cases further illustrating the doctrine are as follows: In *Lake County v. Graham*, 130 U. S. 674, the suit was on coupons detached from bonds of the county of Lake. The bonds were exchanged for warrants of the county amounting to \$500,000. The amount was in excess of the constitutional limitation of Colorado (sec. 6, art. 11). It was admitted that unless the recitals in the bonds estopped the county from alleging the constitutional limitation the bonds were invalid.

Each bond recited that it was one of 710 funding bonds, each of like date, comprised in three series A, B and C, the whole amounting to \$500,000; and further, that each bond was issued under and by virtue of and in full compliance with the enabling act, which was recited, and that all the provisions and requirements of the act had

¹ *Quaker City Nat. Bank v. Nolan*—*Lake Co. v. Rollins*, 130 U. S. 662; *Co.*, 59 Fed. Rep. 660; *Sutcliffe v. Lake Co. v. Graham*, 130 U. S. Board, 147 U. S. 230; *Francis v.* 674; *Nesbit v. Riverside Ind. Dist.*, *Howard Co.*, 54 Fed. Rep. 487; 141 U. S. 610.

been fully complied with by the proper officers in issuing the bonds, and that their sale was authorized by a vote of the qualified voters.

The court held the bonds to be void, that the purchaser was informed by the bond itself of the amount of the issue, and that he was bound to ascertain the amount of the assessed value of the property, and that it was but a mere calculation then to learn that the issue of the bonds exceeded the constitutional limitation. As to the recitals, the court said, they made no express reference to the constitution and contained no statement that the constitutional requirements had been observed.

The court referred to and followed the doctrine laid down in *Dixon Co. v. Field*, that the purchaser must look to the records in order to ascertain the amount of debt that could be created.

§ 229. **Same—Cases.**—The Supreme Court of Texas, in case of *Citizens' Bank v. City of Terrell*, 78 Tex. 456 : 14 S. W. R. 1003, made use of the following terse language as to the effect of recitals on over-issue of bonds. The bonds in this case were in excess of the constitutional limit. "Where the authority to create the debt at all, or beyond a given amount, is made to depend upon evidence furnished by official records, the same rule in regard to recitals contained in bonds given for the debt should not be applied. Every holder of such bonds is charged with a knowledge of the provisions of the law relating to their issuance, and if the law points to the records as evidence of the existence of the facts required to authorize their issuance, or to limit the amount of the debt the city may create, such records and not the recitals in the bonds must be looked to by every one who proposes to deal in the bonds."

The above language was cited with approval in *Quaker City Nat. Bank v. Nolan Co.*, 59 Fed. Rep. 660, 668.

In *Francis v. Howard Co.*, 54 Fed. Rep. 487, where the bonds were in excess of the constitutional limit, the court said : "All the decisions of the Supreme Court of the United States from *Dixon Co. v. Field*, 141 U. S. 83, to *Sutcliffe v. Board*, 147 U. S. 230, agree that the purchasers

of bonds issued by municipalities under authority of laws which limit the amount of bonds to be issued to a certain percentage of the assessment roll or to a given rate of taxation based on such rolls, are charged with notice of the amount of bonds which can be validly issued based on such assessment rolls."

§ 230. **When the bonds will be held valid.**—We now come to the case of *Chaffee Co. v. Potter*, 142 U. S. 355, wherein the bonds, although issued in excess of the constitution of Colorado (sec. 6, art. 11), were held valid. This is the only case up to the present time wherein the bonds so issued have been declared to be valid.

The bonds were issued under authority of an act of the Legislature of Colorado, which authorized counties to fund their floating indebtedness (Laws Colo. 1881, p. 85), and under the very same act the bonds in the case of *Lake Co. v. Graham*, *supra*, were issued, and declared invalid. The form of the bond in this case was drafted, so we are informed, by an eminent writer on municipal law, with the view of estopping the county from pleading as a defence the over-issue of the debt; that his work was well done is shown by the fact that for the first time the courts, both the U. S. Circuit and the U. S. Supreme Court, held bonds issued in excess of a constitutional limitation to be valid.

Each bond in this case recited: "This bond is issued by the Board of County Commissioners of said Chaffee County in exchange at par for valid floating indebtedness of the said county, outstanding prior to August 31, 1882, under and by virtue of, and in full conformity with, the provision of an act of the General Assembly of the State of Colorado, entitled 'An act to enable the several counties of the State to fund their floating indebtedness,' approved February 21, 1881, and it is hereby certified that all the requirements of law have been complied with by the proper officers in the issuing of this bond. It is further certified that the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado, and that this issue of bonds has been authorized by a vote of a majority of the duly qualified

electors of the said County of Chaffee, voting on the question at a general election duly held in said county on the seventh day of November, A. D. 1882. The bonds of this issue are comprised in three series, designated A, B and C, respectively ; the bonds of series A being for the sum of one thousand dollars each ; those of series B for the sum of five hundred dollars each ; and those of series C for the sum of one hundred dollars each. This bond is one of series A."

The recitals in the bonds in the case of Lake Co. v. Graham were identical with the above, except that they did not contain the statement that "the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado," and each bond in Lake Co. v. Graham disclosed the amount of the issue.

Each of the bonds were signed by the chairman of the board of county commissioners, countersigned by the county treasurer, and attested by the county clerk, they being named in the act to *execute* the bonds. Each bond recited that the County Commissioners of Chaffee County had caused the bond to be executed by said officers.

The recitals were therefore made by the officers named in the enabling act to execute the bonds. The case being a very important one on the point under discussion, is given almost in full. Lamar, J., who delivered the opinion of the court, and who also delivered that in Lake Co. v. Graham, said :

"The defences set up in the answer were : that the bonds had not been authorized by a vote of the qualified voters of the county, and no bonds had been authorized to be exchanged for the warrants of the county, and the board, therefore, never had any jurisdiction to issue them ; that the bonds, and each of them, were issued in violation of sec. 6, art. 11, of the constitution of the State, and the debt which they assumed to fund was contracted in violation of said provision of the constitution, and that the bonds were issued by the board of county commissioners without any consideration valid at law, as plaintiff well knew when he received the coupons sued on.

“ A demurrer to the answer on the ground that it was not a sufficient defence to the action was sustained by the Circuit Court, and the defendants electing to stand by their pleading, judgment was entered in favor of the plaintiff for the full amount of his claim, with interest, 33 Fed. Rep. 614. This writ of error is prosecuted to review that judgment.

“ The ground upon which the Circuit Court based its decision and judgment was that the county should be estopped, by the recitals in the bonds, from pleading the defences set up in the answer.

“ The act of the Legislature, under the authority of which the bonds were issued, is set out in the margin. It is the same act under which certain bonds were issued by Lake County, Colorado, which bonds were under consideration in *Lake County v. Graham*, 130 U. S. 674.

“ The bonds in that case were quite similar to those now under consideration, differing only as regards their recitals in this, that the bonds here contain the additional recital that ‘the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado,’ and do not show upon their face, as did those in that case, how many bonds were issued, or how large each series was. We held in that case that the county was not estopped from pleading the constitutional limitation, because there was no recital in the bonds in regard to it, and because also the bonds showing upon their face that they were issued to the amount of \$500,000, the purchaser having that data before him was bound to ascertain from the records the total assessed valuation of the taxable property of the county, and determine for himself, by a simple arithmetical calculation, whether the issue was in harmony with the constitution, and that the bonds, having been issued in violation of that provision of the constitution, were not valid obligations of the county. Our decision was based largely upon the ruling of this Court in *Dixon County v. Field*, 111 U. S. 83. To the views expressed in that case we still adhere; and the only question for us to consider therefore is: Does the additional recital in these bonds above

set out and the absence from their face of anything showing the total number issued of each series and the total amount in all, estop the county from pleading the constitutional limitation.

“In our opinion these two features are of vital importance in distinguishing this case from *Lake County v. Graham*, and *Dixon County v. Field*, and are sufficient to operate as an estoppel against the county. Of course the purchaser of bonds in open market was bound to take notice of the constitutional limitation of the county with respect to indebtedness which it might incur. But when upon the face of the bonds there was an express recital that that limitation had not been passed, and the bonds themselves did not show that it had, he was bound to look no further. An examination of any particular bond would not disclose, as it would in the *Lake County* case and in *Dixon County v. Field*, that, as a matter of fact, the constitutional limitation had been exceeded, in the issue of the series of bonds. The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll whether the county had exceeded its power, under the constitution, in the premises. True, if a purchaser had seen the whole issue of each series of bonds and then compared it with the assessment roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the constitution. But this is not the test to apply to a transaction of this nature. It is not supposed that any person would purchase all the bonds at one time, as that is not the usual course of business of this kind. The test is: What does each individual bond disclose? If the face of one of the bonds had disclosed that, as a matter of fact, the recital in it, with respect to the constitutional limitation, was false, of course the county would not be bound by that recital, and would not be estopped from pleading the invalidity of the bonds in this particular. Such was the case in *Lake County v. Graham* and *Dixon County v.*

Field, but that is not this case. Here, by virtue of the statute under which the bonds were issued, the county commissioners were to determine the amount to be issued, which was not to exceed the total amount of the indebtedness at the date of the first publication of the notice requesting the holders of county warrants to exchange their warrants for bonds at par. The statute in terms gave to the commissioners the determination of a fact, that is, whether the issue of the bonds was in accordance with the constitution of the State under which they were issued, and required them to spread a certificate of that determination upon the records of the county. The recital in the bonds to the effect that such determination had been made, and that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, under the law estops the county from saying that it is untrue. . . .

"We think this case comes fairly within the principle of those just cited; and that it is not governed by *Dixon County v. Field*, and *Lake County v. Graham*, but distinguished from them in the essential particulars above stated."

§ 231. **Author's comments on *Chaffee Co. v. Poertt*.—**

It will be observed that the grounds upon which the bonds in this case were held to be valid are, as distinguished from all the other cases wherein bonds were held void because in part or in whole in excess of the constitutional limit, that the bonds did not on their face inform the purchaser of the total amount of the issue, and that if he should have ascertained the amount of the assessed value of the property from the county records and have made an arithmetical calculation as pointed out by the constitution, he would not have discovered that the issue was in excess of the limit, because the bond did not disclose to him the amount of the bond issue; and the decision is placed upon the additional fact that the recital in the bonds itself assured the purchaser that the issue was within the constitutional amount and did not exceed it.

The absence of information of the amount of the issue and the presence of the recital assuring the purchaser that the total issue did not exceed the limitation are the distinguishing marks between this and all the other cases which have held bonds issued in excess of the constitutional limit void.

What would have been, or what will be, should a case arise, the decision of the courts, had one of these distinguishing features been absent, is uncertain. In the case of *Dixon Co. v. Field*, *supra*, the bonds contained the statement that they were issued "under and by virtue of chapter 35 of the general statutes of Nebraska and amendments thereto, and the constitution of said article 12, adopted October, 1875," and as the words, "By virtue of" the enabling statute have been held, and are usually held, in favor of *bona fide* holders to import full compliance with the statute, the same construction should be placed upon them when they have reference to the constitution. In this latter case they refer not only to the State constitution, but to the very article containing the limitation, and their object was to assure a purchaser that the bonds were issued in conformity with the constitutional limitation. Therefore, we find absent in this case but one of the two distinguishing features in *Chaffee Co. v. Potter*, that is, the amount of the issue of the bonds in this case is stated, while in the other it is not, yet the bonds were declared illegal. It is very doubtful if the court would hold bonds or other municipal paper to be valid, no matter what they recite, if they are issued in excess of a constitutional limitation and the prohibition limits the amount of debt which may be incurred to some percentage of a public record, when the bonds or other paper show upon their face the total amount of the issue.

§ 232. **Author's conclusions as to effect of recitals.**—The rule in regard to recitals in bonds issued in excess of a constitutional limitation therefore appears to be :

1. That when the bond shows upon its face the total amount of the issue, the purchaser is bound to ascertain

at his peril whether or not the amount of the issue exceeds in whole or in part the limit established by the constitution, notwithstanding any recitals the bond may contain.

2. That when the bond does not show on its face the amount of the total issue and recites that the total issue does not exceed the amount of debt the municipality could lawfully contract at the time of the issue under the constitution, or words of like import, and these recitals are made by the officers named in the enabling statute to execute the bonds, or by the body authorized to issue the bonds, or their designated agents, who must be officers of the municipality, whose authority to execute the bonds is to be found in the records of such body, and the duty of the body or officers authorized to issue the bonds is to determine before issue the amount of bonds that could be lawfully issued, which duty may be either express or implied from the language of the enabling act, then the bonds will be held valid in the hands of a *bona fide* holder, although issued in excess of the constitutional limit.

§ 233. **Recovery upon void bonds—When the money can be recovered.**—When a municipality has issued and sold its bonds, which are invalid, either from failure to perform the conditions precedent, from want of power, or because the issue exceeds the statutory or constitutional limitation, or some other cause, it would appear from the cases¹ that the holder may, except in case of an issue in excess of the constitutional limitation, or want of power for other constitutional reasons, recover from the municipality the money paid in an action for money had and received, and it has been held that it is unnecessary to offer to return the void bonds before bringing suit, provided they are produced at the trial.²

§ 234. **Cases illustrating position of the courts.**—A few cases illustrating the position of the courts on the

¹ Paul v. Kenosha, 22 Wis. 266; Louisiana v. Wood, 102 U. S. 294; Gause v. City of Clarksville, 1 Fed. Rep. 353. ² Paul v. Kenosha, 22 Wis. 266; 2 Dill. (4th ed) § 938.

subject is given, wherein the money was sought to be recovered on bonds void because of some statutory defect.

In the case of *Citizens' Bank v. City of Terrell*, (Tex.) 14 S. W. R. 1003, it was held, where there was an excessive issue of bonds, that "if the bonds issued were delivered at different dates, those first delivered up to the amount of the debt the city could lawfully create should be paid and the others should be treated as nullities, but if the bonds were delivered at the same time, so that none had priority over the others, the amount of the valid debt should be distributed equally between the bonds.

"If no other means existed of distinguishing the order of issue, then from necessity the number of the bonds should be looked into, but this should not be done if there is any other way to determine the fact."

In the case of *Louisiana v. Wood*, 102 U. S. 294, it appeared that the City of Louisiana, Mo., having power to borrow money for the payment of its debts, issued bonds for the purpose of raising the means to pay its interest-bearing debt and the expenses of its government.

The bonds recited that they were issued under the authority of the city charter and an ordinance passed pursuant thereto. They were not, in fact, executed until July 16th, 1872, but were antedated as of January 1st, 1872, for the purpose of evading a law of the State passed March 28th, 1872, which enacted that no bond thereafter issued by any county, city or incorporated town, for any purpose whatever, should be valid or negotiated until it is registered by the State auditor and his certificate of such registration endorsed thereon. The defendant in error purchased the bonds from an agent of the city, and had no knowledge that the bonds were antedated, or that the recitals on the face of the bonds were not true.

Chief Justice Waite, after stating the facts, delivered the opinion of the court, and held the bonds to be invalid, but also held that the defendant in error was entitled to recover the amount paid; that the city was in the market as a borrower and received the money in that character. That it would be a wrong to permit the city to keep the money and repudiate the bonds. The city

had the authority to borrow and the objection went only to the way it was done.

§ 235. **Same.**—In *Read v. Plattsmouth*, 107 U. S. 568, it appeared negotiable coupon bonds were issued without authority of law. Read purchased the bonds for full value and without knowledge of their invalidity. The money was used to erect a school-house for which it was intended. By an act of the Legislature subsequently passed, the bonds were sought to be made valid.

It was contended on the part of the city, first: that at the time the bonds were issued there was no law which authorized them; second, that the curative act of the Legislature was itself void, because it was in contravention of the constitution of the State which provided that the Legislature of the State “shall pass no special act conferring corporate powers.”

The court held that “as the city of Plattsmouth was bound by the force of the transaction to repay to the purchaser of its void bonds the consideration received and used by it or a legal equivalent, and that the statute, which recognized the existence of that obligation, and confirmed the bonds themselves, provided a medium for enforcing it according to the original intention and promise, could not be said to be a special act conferring upon a city any new corporate power.”

The bonds were sustained.

In another case, *Gause v. City of Clarksville*, 1 Fed. Rep. 353, the bonds sued upon were declared to be void because the city did not possess the power to borrow and issued negotiable securities. The opinion of the court was delivered by Justice Dillon, who said: “But the plaintiff may amend and add, in respect to these bonds, counts in the nature of counts for money had and received. Adhering to the decision of this court by *Treat, J.*, in *Wood v. Louisiana*, at the last term, the present holders of the bonds will then be treated as the assignee of the original holder, a payee in respect of the money actually lent to the city; and if after the city obtained it the same was in fact expended for the erection and repair of wharves or the improvement of streets, or

possibly, if expended for other authorized municipal purposes, the amount advanced with the lawful interest may be recovered."

In *Hoag v. Town of Greenwich*, 133 N. Y. 152, the bonds were issued payable in twenty years instead of thirty years as required by the statute authorizing their issue. The court held the bonds themselves, for this reason, to be void, but that as the commissioners had authority to borrow the money which the bonds were meant to secure, they by doing so bound the town to secure it, and that as the parties acted in good faith a promise on the part of the town to repay the money would be implied in the manner prescribed by the statute, and an action thereon against the town would lie.

§ 236. **Same—Fund to be divided pro rata.**—In *Davies Co. v. Dickinson*, 117 U. S. 657, the county voted a subscription of \$250,000 to a railroad company. Bonds to that amount were first issued, and afterwards other bonds in excess of that amount were also issued. As a record of the sale of the bonds had been kept and the excessive issue could be ascertained and separated from the valid issue, the court held that these facts could be shown in a suit brought by the holder of some of the bonds issued in excess, although the judge had certified to them as being valid in the same manner as he had also certified on the issue of the other valid bonds.

In another case, where the bonds were issued in excess of the statutory limitation, the total issue being for \$92,500, when but \$25,150 could have been issued, the court directed that the \$25,150 be divided *pro rata* among the holders of the \$92,500 of bonds, and that as the county had paid interest on the total issue, it was entitled to credit for the money so paid without interest, to be deducted from the \$25,150.¹

In a case in Iowa,² where it appeared that bonds were issued partly in excess of the constitutional limitation,

¹ *Gillman v. Davies Co.*, 14 S. W. Iowa, 48. See also *Morton v. Nevada*, 41 Fed. Rep. 182-S. R. 838.

² *McPherson v. Foster Bros.*, 43

the total issue being for \$15,000, when but \$2,057.50 could lawfully be issued, a court of equity held that each bond of the whole issue was valid to the extent it represented a portion of the debt that could lawfully be contracted.

In one case,¹ where the holder of a part of the over-issue brought suit to recover on the bonds he held, the court gave judgment for the defendant corporation, because it was impossible to ascertain what bonds had been issued prior to the limitations of the debt and what after.

The court, by Shiras, J., in dismissing the action said : "It seems to me that the only means of solving the difficulties of the situation is for the plaintiff and the other non-resident bondholders to unite in a proper proceeding in equity against the county and such other bondholders as shall refuse to act as complainants, and in such suit it can finally be determined for what amount the county can be held liable, and the rights of the respective bondholders in and to this sum can be decreed."

§ 237. **Money must have been applied to lawful purpose.**—The money received from the sale of void bonds or other corporate paper must be used by the municipal corporation for some lawful corporate purpose and under the direction of the corporate body, or its use for such purpose be ratified afterwards by such corporate body.²

If a municipal officer without authority borrows money and uses it for the corporation, the money cannot be recovered from the city upon the paper issued by such officer, or in an action for money had and received, unless the corporation ratified the action of its officer.³

¹ *Etna Life Ins. Co. v. Lyon Co.*, 44 Fed. Rep. 329-345.

² *Railroad Nat. Bk. v. Lowell*, 109 Mass. 214; *Allen v. Intendant and Councilmen*, 89 Ala. 644. Where a school district contracted for a loan on bonds which were afterwards declared to be void, it was held it

was liable for the money advanced in good faith under the contract which was used for school purposes. *State v. Dickerman* (Mont.), 40 P. R. 698.

³ *Agawam Nat. Bk. v. South Hadley*, 128 Mass. 503-7; *Hackettstown v. Swackhamer*, 37 N. J. L. 191.

The law in relation to the recovery of money by the holder of void bonds seems to be, unless the corporation be estopped by its recitals in the bonds or its records, to set up the illegality, as follows :

1st. That the holder of void bonds, if he obtained them in good faith before maturity and for full value, or through such a former holder, may sue the municipal corporation, not upon the bonds, but for money had and received, and may recover in such action, provided the municipal corporation had the power to do the work or make the public improvement, for which the money was obtained and used.

2d. That if the municipal corporation did not have the authority to do the work and make the public improvement, or if the money was obtained for a public object, the municipality had authority to do, but the money was used for some purpose about the doing of which the municipality had no authority to act, then the holder cannot recover at all.¹

238. No recovery on void unconstitutional bonds—Exceptions.—It is the well settled doctrine that bonds issued in excess, or partly in excess, of the constitutional limitation are void in all hands,² unless those issued within the limitation can be separated from those beyond

¹ In *Dodge v. City of Memphis*, 51 Fed. Rep. 165, the court, by Thayer, J., after referring to a number of cases where a recovery was had in an action for money had and received, said :

“They show no doubt that when a municipal corporation sells bonds which are void, and receives the money, it may be compelled to restore it in an action for money had and received. So, when a municipal corporation is authorized to purchase property for any purpose, or to contract for the erection of public buildings, or for any other public work, and it enters into such authorized contract, but pays for the property acquired or work done

in negotiable securities, which it has no express or implied power to issue, it may be compelled to pay for that which it has received in a suit brought for that purpose. In no case, however, does it appear that a suit has been sustained on a void bond treating it as non-negotiable and as something entirely different from what the parties intended it should be.”

² *Dixon Co. v. Field*, 111 U. S. 83; *Buchanan v. Litchfield*, 102 U. S. 278; *Davies Co. v. Dickinson*, 117 U. S. 657; *Mosher v. Ind. School Dist.*, 44 Iowa, 123; *Gould v. Paris*, 68 Tex. 511; *Lake Co. v. Graham*, 130 U. S. 674.

it. If, however, they contain recitals such as in *Chaffee Co. v. Potter*, referred to elsewhere herein, they will be held valid.¹

When the bonds are in excess, in whole or in part, of the constitutional limit, or without a vote when required by the constitution, and the valid cannot be separated from the invalid, the Federal courts² hold that no action as for money had and received would lie against a municipal corporation, because the constitution prohibited the incurring of a debt beyond a certain limit or without such prior affirmative vote, and although it used the money it received from the bonds for municipal purposes, such use was prohibited by the constitution, because it could not incur a debt for any purpose beyond a certain limit or without such a vote.³

When, however, bonds are void because of some failure on the part of the municipal officers to perform or comply with some provision of the constitution, as to create a sinking fund or provide an annual tax to pay the principal and interest of the bonds, or to register or have registered the bonds, and the money arising from the sale of said bonds is applied by the corporation to the object for which they were issued, the holder of the bonds, while not permitted to recover on them, should be allowed to recover from the corporation in an action for money had and received, or other proper action, the money so borrowed and used by it for the lawful purpose.⁴

§ 239. **No relief in equity.**—A court of equity will not aid the holder of void bonds.

¹ See § 230.

² *Morton v. Nevada*, 41 Fed. Rep. 182; *Sutcliffe v. Lake Co. Com'rs*, 147 U. S. 230; *Dixon Co. v. Field*, 111 U. S. 355; *Hedges v. Dixon Co.*, 150 U. S. 182.

³ See, however, § 236.

⁴ In *Rainsburg Borough v. Fyan*, 127 Pa. St. 74, the court held that where bonds were issued by a borough and no provision was made for an annual tax sufficient to pay the in-

terest and principal thereof within thirty years, as required by sec. 10, art. 9 of the Pennsylvania constitution, that, although the bonds were void, yet that an action to recover the money loaned could be sustained, because the money so borrowed was used to pay an existing valid indebtedness, and that there was but a mere exchange of one creditor for another.

The following cases illustrate the position of the equity courts in this respect.

In *Litchfield v. Ballou*, 114 U. S. 190, it was sought by a bill in equity to have the money which the city had received from the defendant in error on its void bonds, issued in excess of the constitutional limitation, and used by the city for the construction of its water works, decreed to be a lien upon such works, to the extent of the money so advanced.

The opinion of the United States Supreme Court was delivered by Mr. Justice Miller, who said :

“The language of the constitution is that no city shall be allowed to become indebted in any manner or for any purpose to an amount exceeding five per centum of the value of its taxable property. It shall not become indebted, shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds or notes, nor by express or implied promises. Nor shall it be done for any purpose, no matter how urgent, how useful, how unanimous the wish. The prohibition is as effectual against the implied as against the express promise, and is as binding in a court of chancery as in a court of law.” The court refused to grant the relief prayed and reversed the decree of the court below, which had sustained the view of the plaintiff.

Where bonds were issued pursuant to a statute in satisfaction of a judgment obtained against the corporation upon warrants issued in excess of the constitutional limit, the court held the bonds valid in the hands of an innocent purchaser, and that they could not be attacked in his hands by showing that the municipal authorities fraudulently omitted to interpose the defence when the warrants were sued upon.¹

In *Hedges v. Dixon Co.*, 150 U. S. 182, the appellant Hedges, who held most of the whole issue of bonds issued partly in excess of the constitutional limitation, offered to surrender the bonds in excess to be cancelled and sought to have the balance decreed to be paid by the

¹ *Sioux City etc. R. R. Co. v. Osceola Co.*, 45 Iowa, 168 ; 52 Ib. 26.

county. The court refused to grant the aid or interfere, and held that, in the absence of fraud, accident or mistake, a court of equity would not act.¹

The bonds in this case were negotiable and made payable to the railroad company or bearer. They were delivered to the company and by it negotiated. The bonds were issued after an affirmative vote of the voters, and they, in the proposition submitted, fixed the amount of the issue, which exceeded in part the constitutional limit of indebtedness as fixed by the constitution of Nebraska.

The court, in refusing the aid, laid particular stress upon the fact that the vote authorized an issue of a certain sum, and that the court had no authority to change this sum or to say that the voters intended to authorize an issue of bonds to an amount not exceeding the limit of debt the county then might have contracted for.

The language of the court on this point is as follows : " What the county authorized and carried into execution in the present case, both by the vote and by the donation, was one entire transaction, and if it should be so reformed as to curtail the entire issue of bonds to such an amount as was within the constitutional limits of the county to donate, it would be something different from that which was voted by the county and carried into effect by the issue of the bonds. This would involve the making of a different donation from what the county voted and intended to make to the railroad company." The court also laid particular stress upon the fact that the county did not receive the proceeds of the bonds and apply them to some lawful public purpose. On this point the court said : " The circumstances and conditions which gave the holders of the bonds an equitable right in those cases (referring to *Louisiana v. Wood*, 102 U. S. 294, and *Read v. Plattsmouth*, 107 U. S. 568), to recover from the municipality the money which the bonds represented, do not exist in the case under consideration, where the county received no part of the proceeds of the bonds and no direct money benefit, but merely derived an incidental advantage arising from the construction of the railroad, upon

¹ See § 236.

which advantage it would be impossible for the court to place a pecuniary estimate, or to say that it would be equal to such portion of the bonds in question as the county could lawfully have issued. Moreover, by the provisions of the constitution of the State of Nebraska, and by the express terms of the proposition submitted to the vote of the people of Dixon County, the bonds in question were issued *as a donation to the railroad company*, and, being intended as a donation, it cannot properly be said that the purchasers of these bonds from the railroad company paid any consideration therefor to the county so as to raise any equity as against it for the amount represented by the bonds or any part thereof. Any equitable demand which might under the circumstances have existed against the county, on the theory of consideration received, was in favor of the railroad company which constructed the railroad and thereby conferred all the incidental benefits which the county derived from the transaction. If any equitable claim arises in favor of the holders of the bonds, it must be against the railroad company from whom the bonds were purchased and by whom their payment was guaranteed, as that company was the recipient of the legal consideration realized upon the negotiation of the bonds."

As we have elsewhere seen,¹ courts of equity have granted relief in cases where the total issue of the bonds exceeded only in part the constitutional limit of indebtedness, and the proceeds of the bonds have been applied to the public purpose for which they were issued, by scaling down the total issue to the lawful amount they could have, in the first instance, been issued for, and dividing that amount *pro rata* among the bondholders.

¹ See § 236.

CHAPTER XVI.

ESTOPPEL OTHER THAN BY RECITALS IN THE BOND— CURATIVE ACTS.

SECTION.

- 240—Estoppel by the record of corporation relative to the issue of bonds—*Bona fide* holder need not look further than the record.
- 241—As against a *bona fide* holder the records cannot be impeached—Court records.
- 242—Estoppel by ratification and acquiescence.
- 243—By payment of interest—Cases.
- 244—Estoppel by retaining stock—Pendleton Co. v. Amy, 13 Wall. 297, an extreme case—No vote, yet bonds valid.
- 245—Opposite doctrine, the safe one—Marsh v. Fulton Co., 10 Wall. 676.
- 246—Laches on part of taxpayer—He must act promptly—Want of power can always be pleaded—No decided case to contrary.
- 247—Ratification by municipality of unauthorized issue of bonds—No estoppel where want of power exists.
- 248—Principle upon which these estoppels rest.
- 249—Estoppel by judgment—*Res adjudicata*—The general rule—Estoppel by judgment enlarged.

SECTION.

- 250—Doctrine modified—Cases.
- 251—Cases illustrating the position of the courts.
- 252—Doctrine of estoppel applies to non-negotiable paper.
- 253—When bonds are void for non-performance of conditions precedent—In such cases it is immaterial whether they contain recitals or not.
- 254—Same—Cases illustrating the doctrine.
- 255—The force of the statute or constitution renders the bonds void.
- 256—Curative acts—When such acts may be passed—Their objects—Rule laid down by Cooley.
- 257—Constitutional defects cannot be cured.
- 258—Cases illustrating doctrine.
- 259—What may be cured—Whatever the Legislature might have done, it may afterwards do—Whatever it might have waived it may afterwards waive.
- 260—When an unconstitutional act may be cured—If defect is only as to form it may, but if as to object it cannot—How curative acts should be drafted.

§ 240. **Estoppel by record.**—A municipality may also be estopped by its records when the decision or determi-

nation of the prior conditions are to be determined by the officers named in the enabling statute or by the legislative body or certain officers of the municipality, and their determination is to be reduced to some matter of record, as an affidavit of some of the officers to be filed in a public office or the minutes of the proceedings, or an ordinance or resolution of the municipality relating to the issue of the bonds, and such public evidence of the determination of the performance of the prior conditions shows that the question has been passed upon and settled, and afterwards the bonds or other municipal paper is uttered and finds its way into the hands of an innocent holder, the municipality will be estopped, although the bonds contain no recitals, to show that the records are in fact untrue, and the holder of the bonds need not look further than such records for proof of the performance or observance of the conditions required to authorize the issue.¹

A case illustrating the doctrine is that of *Black v. Commissioners*, 99 U. S. 686-696.

It appeared the bonds were issued in payment of a subscription to a railroad. They contained no recitals. The defence was that a majority of the voters had not voted in favor of the subscription. The suit was on overdue coupons detached from the bonds.

The court said :

"The bonds, it is true, contain no recitals. If they did contain a recital that an election had been held, and that a majority had voted for the issue of the bonds, the recitals would have been conclusive upon the county, and a purchaser would have needed to look no further than to the act of the Legislature. This is according to all our decisions. But in the absence of any recital it may be conceded that he was bound to inquire whether a majority vote had been returned for the issue of the bonds.

¹ First Nat. Bk. v. Concord, 50 Vt. 257; Hutchinson & R. Co. v. Fox, 48 Kan. 70; Gause v. Clarksville, 1 McCrory, 78; Aberdeen v. Sykes, 59 Miss. 236; Town of Eagle v. Kohn, 84 Ill. 292; Chicago & R. R. v. Harris, 30 Pac. R. 456; State v. Commis., 37 Ohio St. 526; West Plains Tp. v. Sage, 69 Fed. Rep. 943.

But where was he to inquire? Plainly only of the board whose province it was to ascertain and declare the result of the election. Had he gone to their records they would have shown that the popular vote was in favor of the bond issue.

“He was not bound to canvass the vote for himself or to revise and correct a mistaken canvass, any more than he was bound to inquire into the qualification of the electors, and if, relying upon the canvass of the board and the declared result, he accepted the obligations of the county, it would be a strange doctrine were we to hold that a second canvass, made many years afterwards, could reverse the first and annul the rights that had been acquired under it. There is no such law. For all legal purposes the result of an election is what it is declared to be by the authorized board of canvassers, until their decision is reversed by a superior court, and a reversal has no legal effect upon acts done prior to it.”

And in another case, where it appeared the common council of a city was authorized to subscribe for stock in a railroad and to issue bonds in payment therefor on petition of three-fourths of the legal voters of the city, the council, before the issue of the bonds, decided that three-fourths of the citizens had petitioned for the issue, the court held that the council was the tribunal to determine whether the required number had petitioned, and it having so decided and issued the bonds the city could not afterwards set up as a defence that the requisite number had not petitioned.¹ In this case the bonds also recited the act.

And where the act which authorized the issue of the bonds was not to take effect until approved by two-thirds of the electors present at a city meeting held for that purpose, and a copy of its doings lodged in the office of the Secretary of State, the court held that the purchasers of such bonds were not bound to look beyond the certificate thus lodged.²

¹ Bissell v. Jeffersonville, 24 How. 287. See also Van Hostrup v. Madison City, 1 Wall. 291; Meyer v. Muscatine, 1 Wall. 323.

² Soc. for Savings v. New London, 29 Conn. 174.

The courts of New York State held under the statutes which, before the adoption of the present constitutional prohibition, permitted municipalities to aid railroads, that, although the statute authorizing the issue of town bonds to aid railroads expressly provided that the affidavits attached to the written assents of the requisite number of residents were to be made by the officers who were to issue the bonds and were required to state that the assent was signed by the requisite number of such residents, and to be filed in a public office, yet the affidavits should not be conclusive of the facts stated, unless the law expressly so made them,¹ although the courts acknowledged that the Federal courts held the contrary doctrine.²

In the case of *Bank of Rome v. Village of Rome*, 19 N. Y. 20, where it appeared that the commissioners of the railroad fund of Rome were authorized to subscribe for stock in a railroad company and to issue bonds with which to pay for the same after five hundred thousand dollars had been subscribed to the stock of the railroad company by third parties. By the enabling act the commissioners were not to negotiate, sell, or transfer the bonds until after they had made and subscribed a certificate in writing, that the said subscription of five hundred thousand dollars had actually been made, and in their judgment and belief, in good faith, and by persons of ability sufficient to pay their subscriptions in full, and that such certificate should be filed with the clerk of the board of trustees of the village of Rome.

The commissioners filed such certificate.

The court held the certificate to be conclusive, and that it could not be shown as against the *bona fide* holders of the bonds that the facts set forth in the certificate were untrue.

§ 241. **Records cannot be shown to be false.**—The record of the proceedings of a municipality relating to the issue of the bonds cannot, as against a *bona fide* holder, be shown to be false, and they import absolute

¹ *Cagwin v. Hancock*, 81 N. Y. 532.

² *Town of Venice v. Murdock*, 92 U. S. 94.

verity, and in a collateral proceeding, after the rights of third persons have accrued, cannot be impeached by parol.¹

And where a recital is placed on the minutes of the corporation that bonds are issued for a certain lawful purpose, it cannot be shown, as against *bona fide* holder for value, that the real object of their issue was illegal.²

Where the records of a municipal corporation show that all the steps necessary to legally issue the bonds have been performed, and the same book of records, but not among the proceedings relative to the issue of the bonds, discloses the fact that the bonds were illegally issued, such latter recorded fact cannot be admitted, as against a *bona fide* holder, to defeat the title of such holder.³

A purchaser of a municipal bond containing proper recitals made by the authorized officers is not bound to inspect the records of the body issuing the bond, or bound by matters in the book of records which would, had he inspected them, informed him that the bonds were issued for an illegal purpose.⁴

It is the general doctrine of the Federal and State courts that the proceedings of a court or judge authorized to issue, or cause to be issued, municipal bonds, cannot be attacked collaterally, but must be reviewed, if at all, by some other court of higher jurisdiction.⁵

¹ Bissell v. City of Jeffersonville, 24 How. 288; Mathias v. Runnels Co., 66 Fed. Rep. 491; Clapp v. County of Cedar, 5 Iowa, 15; Lynde v. Winnebago Co., 16 Wall. 6.

² Aberdeen v. Sykes, 59 Miss. 236.

³ West Plains Tp. v. Sage, 69 Fed. Rep. 943.

⁴ West Plains Tp. of Meade Co. v. Sage, *ib.*

⁵ Town of Cherry Creek v. Becker, 123 N. Y. 161; Hoag v. Town of Greenwich, 123 N. Y. 157; Lynde v. The County, 16 Wall. 6; Freeman on Judg. § 135.

In Mathias v. Runnels Co., 66 Fed.

Rep. 491, where the records of a county court showed that an order directing the issue of the bonds and of an annual tax to pay them had been passed in February but was inserted among the order of business in the July term, it was held after the bonds were issued, that as against a *bona fide* holder it could not be shown that the order was not passed at the time it purported to be.

In one case where the vote to issue bonds was taken by a division of voters instead of by ballot, and the record of the town clerk showed

§ 242. **Estoppel by ratification and acquiescence.**—A municipal corporation may be estopped by its own acts, other than by its recitals or its records, from denying the validity of its bonds or other paper, when such bonds or other paper are invalid by reason of some irregularity in the exercise of the express power to issue, such as a failure to properly comply with all the preliminary steps necessary under the statute to be performed prior to the issue of the bonds.

It has been repeatedly held, by both the Federal and State courts, that the failure of a taxpayer or the corporation itself to enjoin the issue of the bonds followed by recognition of them, such as the payment of interest on them or of the principal of some of them,¹ the retention of the consideration, as where they have been given in exchange for stock, the retention of the stock,² to operate as an estoppel upon the municipality from setting up non-compliance with the conditions precedent as a defence in an action brought on either the coupons or the bonds by a *bona fide* holder.³

A reference to some of the cases wherein this doctrine of estoppel was applied will illustrate it.

§ 243. **By payment of interest.**—In the case of *Supervisors v. Schenck*, 5 Wall. 781, it appeared that counties were authorized by statute, upon a proper vote, to subscribe for stock and pay in bonds. An election was ordered by the county court, when in fact it should have been ordered by the board of supervisors. At the election the proposition was carried and the supervisors subscribed and issued the bonds, received the stock, ordered the levy of taxes and paid the *coupons* attached to the

that it was done by ballot, it was held that the town and its officers were estopped to show that no ballot was taken. *New Haven etc. R. Co. v. Chatam*, 42 Conn. 465.

¹ *People v. Kline*, 63 Ill. 391; *Goshen Township v. Shoemaker*, 12 Ohio St. 624; *Munson v. Lyons*, 12 Blatchf. (U. S.) 539; *Hannibal R. R. Co. v. Marion Co.*, 36 Mo. 295.

² *Third Nat. Bk. v. Seneca Falls*, 15 Fed. Rep. 783; *Whiting v. Potter*, 18 Blatchf. 165.

³ *Brown v. Bon Homme*, 46 N. W. R. 173; *Portsmouth Sav. Bk. v. Springfield*, 4 Fed. Rep. 276; *Clay Co. v. Soc. for Sav.*, 101 U. S. 579; *Morris Co. v. Hickman*, 31 Kan. 729.

bonds as they fell due for a period of from nine to ten years. The court held that by its acquiescence, conduct and acts the county had ratified the bonds, at least in the hands of an innocent holder, and that the county was estopped to set up the irregularity mentioned as a defence.

In the case of *Brown et al. v. Milliken County Clerk*, 42 Kan. 769, where it appeared the funding bonds in suit were issued in exchange for former bonds issued in aid of a railroad, and the proceedings in relation to the issue of the funding bonds were defective, the defence sought to be interposed being that they were illegally issued (1) because in excess of the amount authorized by law; (2) in excess of the amount stated in the notice of election; (3) because the notice of election gave only fifteen days' notice, whereas the statute required thirty days. It appeared that the township for a number of years levied and collected taxes for, and paid the *interest* on, the funding bonds, and paid a part of them off; they kept the original bonds and cancelled them. The court held that the defences could not be pleaded, and that by said acts it was estopped to plead such irregularities.

In the case of *State v. Van Horn*, 7 Ohio St. 331, it appeared the bonds in suit were issued to aid a railroad, that in fact had not been located and should have been located before the bonds were sold, and the township received the proceeds.

It also paid the *interest* for a period of three or four years. The county retained possession of the money and refused to pay further the interest on the bonds.

The court held, that although the railroad was not located, the county by said acts was estopped.

In the case of *Calhoun v. Millard*, 121 N. Y. 69, on suit brought in equity by certain taxpayers of the town to have its bonds issued in aid of a railroad, which bonds were invalid for irregularities in their issue, surrendered up for cancellation by the then present holders, who were *bona fide* holders before maturity and without notice.

The town had recognized the bonds as valid and for nine consecutive years paid the *interest* on the same.

The court refused to entertain the complaint and said in part :

“The town and the taxpayers permitted the bonds to be dealt with and taken by savings banks and others for nearly ten years, not only without, so far as appears, a word of warning or protest, but by affirmative acts of recognition encouraged investment therein as safe and valid securities. . . . They are now in the hands of *bona fide* holders. The denial of relief in this case may result in the enforcement of the bonds in question and also of other town bonds issued and held under similar circumstances. But in contrasting the relative conduct and situation of the town and of the taxpayers on the one side, and the purchaser of the bonds on the other, we cannot say that such a result will be repugnant to any principle of justice or equity.”

It has been held that where a town has issued bonds and paid *interest* upon them for six years without questioning their validity, a court of equity will not, at the town's instance, cancel them in the hands of an innocent purchaser for value, even though they were actually invalid.¹

On the contrary, in another State, it has been held that the payment of interest on a bond which does not show on its face any authority for its issue, and which was in fact illegally issued, will not operate either as a ratification or estoppel.²

The act of paying one instalment of interest has been held not to estop the municipality from setting up irregularities in the issue.³

Payment of interest will not be sufficient to estop a municipal corporation from setting up that it had no power to issue its bonds.⁴

¹ Cherry Creek v. Becker, 123 N. Y. 161. Payment of interest for two years has been held to estop the corporation. Leavenworth etc. R. R. Co. v. Comrs. of Douglass Co., 18 Kan. 170. ² Bogert v. Township of Lemotte, 79 Mich. 291. ³ Loan Asso. v. Topeka, 20 Wall. 655. ⁴ Sherrard v. Lafayette Co., 3 Dill. 3 C. C. R. 236.

§ 244. **Estoppel by retaining stock.**—The case of *Pendleton Co. v. Amy*, 13 Wall. 297, is an extreme case on this subject.¹

The county was authorized to purchase stock on condition of a popular vote. It issued its bonds without such a vote being taken and received in exchange a certificate of stock in a railroad company, which it held for seventeen years before the suit on the bonds was brought by an innocent holder.

The bonds contained no recitals and there had been no payment of interest or principal.

¹The court in this case, by Strong, J., said :

“A purchaser is not always bound to look further than to discover that the power has been conferred, even though it be coupled with conditions precedent. If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote has been taken as directed by law, and what the vote was. When, therefore, they make a subscription and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled. To issue the bonds without the fulfilment of the precedent conditions would be a misdemeanor; and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases; but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled. The estoppel in these cases was either by recitals in the bonds that the conditions precedent had been complied with, or by the fact that the county had sub-

sequently levied taxes to pay interest on the bonds. In the present case it does not appear in the pleadings whether or not the bonds contained any such recitals, nor whether the officers of the county had levied taxes to pay interest on them, or whether any interest has been paid. These grounds of estoppel do not exist. But if such acts and such recitals are sufficient to protect *bona fide* purchasers against an attempt to set up non-compliance with the condition attached to the grant of power to issue the bonds, it is not easy to see why the pleadings do not show an estoppel in this case. The county received in exchange for the bonds a certificate for the stock of the railroad company, which it held about seventeen years before the present suit was brought, and which it still holds. Having exchanged the bonds for the stock, can it retain the proceeds of the exchange, and assert against a purchaser of the bonds for value, that though the Legislature empowered it to make them, and put them upon the market, upon certain conditions, they were issued in disregard of the conditions? We think they cannot, and, therefore, that the third plea cannot be sustained.”

The court held, three of the judges dissenting, that purchasing and retaining the stock under these circumstances estopped the county from setting up as a defence the want of popular election authorizing the issue of the bonds.

§ 245. **Opposite doctrine.**—In direct opposition to this case is that of *Marsh v. Fulton Co.*, 10 Wall. 676.

The county issued bonds, without the sanction of a popular vote, and paid interest on them for a number of years, and also paid a part of the bonds. The bonds contained no recitals.

The court held the bonds to be void because the town, without the popular vote, had no authority to issue the bonds, the defect being want of power to act at all.

Field, J., said: "They (the supervisors) could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first place without such authorization."¹

The latter case seems to us to be the better law. The power to issue the bonds depended upon an affirmative vote of the people, and if no vote was taken there was want of power in the county to issue the bonds; and any act done where there is want of power is illegal and void.

¹ Field, J., delivering the unanimous opinion, said: "But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their validity. If such were the fact, we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might, for such a reason, be taken without special inquiry into their validity. It is a case where the power to contract never existed—where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder

was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of *Floyd Acceptances*." In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: "In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that

§ 246. **Laches on part of taxpayer.**—While it is held that the statute of limitations does not run against the right of a taxpayer to contest the validity of an election by which it was determined to issue bonds, yet such action must be brought within a reasonable time after the election and before the rights of third persons have accrued, and where the action was delayed for three years after the election and issuance of the bonds, relief by injunction was denied to restrain the commissioners from collecting the taxes to pay the interest on the bonds.¹

the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterward; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued. It is also contended that if the bonds were issued without authority, their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the supervisors. But the answer to them all is, that the power of ratification did not lie with the supervisors. A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified voters of the county. The supervisors, in

that particular, were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization. It would be absurd to say that they could, without such vote, by simple expressions of approval, or in some other indirect way, give validity to acts when they were directly, in terms, prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition. We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money and property of others without authority, the law, independent of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation to be created in one way, when the statute declares that it shall only be created in another different way."

¹ Jones v. Com'rs, 107 N. C. 248.

In the case, State v. Van Horne,

Where, however, the town or taxpayers act with reasonable diligence, a court of equity will restrain the

7 Ohio St. 331, the court, by Swan. J., said :

“ If the location of the road should have been first made, any taxpayer of the township, for himself and all others interested, could, at any time before the issuing or negotiation of the bonds, have intervened and enjoined their issue as unauthorized, on account of the road not having been located. They, however, either intentionally or from neglect to assert their legal rights, and without protest or interference, suffered the election to take place, their public agents, the trustees, to subscribe for stock, to issue the bonds and receive the proceeds. They also afterward, and for the period of three or four years, paid the interest by taxation, and thus gave credit to the bonds of the township. They now desire to retain the money of the original bondholders, refuse to pay interest, deny their obligations to pay back the principal, disaffirm the acts of their public agents, who under the forms of law and by their direct instigation through the ballot-box, issued and negotiated these bonds. They had an opportunity, before innocent third persons could be injured or committed to the acts of their public agents, to enjoin their proceedings, and protect themselves; they did not seek that protection; but now, when they have received all the fruits of the contracts of their agents from third persons who have acted upon their recognition of the authority of their agents, they ask the privilege of denying this recognition, and thus escape from their obligations. It is too late for them to do so, as against

innocent third persons. They are concluded, not simply by the acts of their public agents, but by their own. It is true, that when public officers exceed the powers vested in them by general laws, their acts are no longer official, but void: and this principle would be applicable to the case before us, if the trustees had derived their sole authority to make the contract under consideration from the law, without any interposition, sanction, or authority from the taxpayers of the township. But, in the case before us the trustees derived their authority to subscribe for the stock of the railroad, and to issue the bonds, specifically from their constituency, the taxpayers of the township. The trustees, unless authorized by the taxpayers, derived no authority to act from the laws under consideration. In fact, the whole transaction under the legislation was for the purpose of consummating an agreement, having all the substantial elements of a private contract, between the taxpayers as principals, who by vote made the trustees their agents to contract for them on one side, and the railroad and bondholders on the other. The rules of law applied to individuals, and founded upon the clearest principles of justice and sound morals, should be equally applicable to these parties. The taxpayers, as principals, and by their votes, in the forms of law set their agents in motion, professed to clothe them with special authority to make a special contract with third persons for their benefit; by voting, instigated those agents to make the subscription and issue the bonds; and

levy of a tax to pay the interest, or will entertain an action for the surrender and cancellation of the bonds if they do not contain recitals, and two years after the issue of the bonds was held to be a reasonable time.¹

Want of power can always be pleaded as a defence, and no acts of the corporation or its officers will estop that fact from being pleaded, although the action is brought by a *bona fide* bondholder, and we have failed to find a decided case holding otherwise. When a constitution requires a public sanction to a subscription by a municipality to railroad stock, such provision prevents the subsequent acts of the municipal officers from operating as a ratification without the assent of the voters.²

The misconduct, irregularity or fraud of the officers of the corporation issuing the bonds or other paper cannot be set up as a defence against a *bona fide* holder of the bonds,³ and fraud in the election authorizing the issue of bonds must be set up in time before the rights of third persons have intervened. The municipality, or a taxpayer thereof, must act promptly in such cases, and a failure to enjoin the issue of the bonds will estop the corporation from pleading such matters as a defence in a suit brought by innocent holders of the bonds.⁴

thus induced, on the faith of this recognition, innocent third persons to part with their money and receive, in lieu thereof, these bonds. If the trustees of the township and the taxpayers supposed, until very recently, as they probably did, that the subsequent permanent establishment and location of the railroad through the township was sufficient to authorize the issuing of the bonds, whether that location was made before or after the election, it is equally just to presume that the bondholders, who parted with their money, entertained the same belief. The one was certainly as much bound to know as the other; and if both were mistaken, no principle of law or justice would

demand that the taxpayers should retain the fruits of the mistake, and, at the same time, repudiate those very acts of their own which misled the bondholders, and induced them to part with their money; in truth, blowing hot to get the bondholders' money, and blowing cold to rid themselves of the obligation to refund it."

¹ Town of Springport v. Bank, 75 N. Y. 379; Metzger v. R. R. Co., 79 N. Y. 171.

² Dill, on Mun. Corp. Vol. 1 (4th ed.) § 548; Norton v. Shelby Co., 118 U. S. 425.

³ Town of East Lincoln v. Davenport, 94 U. S. 801; Grand Chute v. Winegar, 15 Wall. 355.

⁴ Marshall Co. v. Schenck, 5 Wall.

§ 247. **Ratification by the municipality.**—Where bonds are issued by the officers of a municipality without the authority of the legislative body, which, however, has the right to issue the same, and the bonds are afterwards recognized to exist, as by the payment of the interest on them, the retention of their proceeds, and the placing of the same among its liabilities, or in a statement of liabilities or other like recognition, the municipality by such acts will be held to be estopped to deny its liability on them and will be held to have ratified the former unauthorized acts of its agents.¹

781; *Butler v. Dunham*, 27 Ill. 474.

¹ *Brown v. Bon Homme Co.*, 46 N. W. R. 173; *Mills v. Gleason*, 11 Wis. 470; *Freeport v. Marks*, 59 Pa. St. 253; *Marshall Co. v. Schenck*, 5 Wall. 772.

It was held where bonds were issued and sold and the proceeds received before a city was incorporated, and after its incorporation was completed it levied a tax to pay the interest on the bonds that it ratified the issue. *Mills v. Gleason*, 11 Wis. 470.

And in another case where a number of years after a subscription was made by a municipality, it issued its bonds to pay for the subscription, the court held the issuing of the bonds to be a ratification which would warrant a purchaser to assume that all the conditions precedent had been performed. *Barrett v. Schuyler Co.*, 41 Mo. 197.

In *Marshall Co. v. Cook*, 38 Ill. 45, it appeared the election was ordered by the county court when it should have been ordered by the board of supervisors. The vote was in the affirmative. The supervisors issued the bonds. It further appeared that for a number of years the county raised and paid the

annual interest of \$6,000 on the bonds, and also that the county voted yearly on the stock it received.

The court held the bonds in suit void, because of want of power, holding that as the election was not called by the proper officers there was in fact no election under the State; that it was the duty of the purchaser to examine the record, and had he done so he would have ascertained that the election had been called by the wrong body.

It does not appear whether the bonds contained recitals or not.

Where a town pursuant to a statute issued its bonds to aid a railroad and received in exchange the railroad bonds, and for several years thereafter it treated its own bonds as valid by levying a tax to pay the interest thereon and paying it, and afterwards it sold the railroad bonds and used the proceeds, it was held that, as against a *bona fide* holder, it could not set up irregularities in the issue of its own bonds. That it was estopped by its own course of dealing. *Pennington v. Park*, 50 Vt. 178.

In *Barrett v. County Court of Schuyler Co.*, 44 Mo. 197, on *mandamus* to enforce a tax to pay bonds, it appeared that the county,

When the municipality has no authority to issue the bonds, such act being *ultra vires*, it cannot ratify them by any act,¹ but in such a case the Legislature may

by its duly authorized agent, voted upon the stock received for the bonds at the regular meetings of the railroad, from the time of its subscription in 1854 until April, 1867. The court said: "If there were defects in the original subscription, the subsequent action of the county in representing and voting upon the stock subscribed must be held for the purpose of this suit a waiver of such matters."

¹ Howe v. Keeler, 27 Conn. 538.

In Thomas v. Lansing, 14 Fed. Rep. 618, 627, the court said: "The present case falls within the principle adjudged in Marsh v. Fulton Co., 10 Wall. (U. S.) 676, because the power of the town to contract never existed.

"In such case there can be no protection of the holder as an innocent purchaser, and no ratification of a power which never existed by such alleged acts of ratification as are shown in this case."

In Kelly v. Town of Milton, 127 U. S. 137, where, in a suit to enjoin the collection of bonds illegally issued by the town, the suit was discontinued upon a compromise, and the mayor, in pursuance thereto, signed a consent that a decree be entered declaring the bonds to be valid and binding, the court, by Blatchford, J., held the bonds to be invalid, notwithstanding the said decree, and said:

"The act of the mayor in signing that agreement could give no validity to the bond: if they had none at the time the agreement was made. The want of authority to issue them extended to a want of authority to declare them valid.

The mayor had no such authority. The decree of the court was based solely upon the declaration of the mayor in the agreement that the bonds were valid, and that declaration was of no more effect than the declaration of the mayor in the bill in chancery that the bonds were invalid. The adjudication in the decree cannot, under the circumstances, be set up as a judicial determination of the validity of the bonds. Russell v. Place, 94 U. S. 606; Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121, 125. This was not the case of a submission to the court of a question for its decision on the merits, but it was a consent in advance to a particular decision by a person who had no right to bind the town by a consent, because it gave life to invalid bonds; and the authorities of the town had no more power to do so than they had to issue the bonds originally. There is nothing inconsistent with this view in Nashville etc. R. Co. v. United States, 113 U. S. 261, where it was held that a decree in equity by consent of parties, and upon a compromise between them, was a bar to a subsequent suit upon a claim therein set forth as among the matters compromised and settled, although not in fact litigated in the suit to which the decree was rendered. In that case both parties had full power to make the compromise involved."

See also Mills v. Gleason, 11 Wis. 170; Ottawa v. Carey, 108 U. S. 110; Davies Co. v. Dickson, 117 U. S. 657; Burril v. Boston, 2 Cliff (U. S.) 590; People v. Flag, 17

ratify them or authorize the municipality to do so, if not prohibited by the constitution.¹ If so prohibited, the act cannot be ratified.²

The unauthorized acts of public officers may be ratified, either by some express act of the corporation or by the subsequent course of dealing of the corporation relative to the unauthorized act, from which a ratification will be presumed, as, for instance, retaining the proceeds of the act, or acquiescing in it by payment of interest on a part of the principal of the unauthorized debt,³ but a municipal corporation cannot ratify an unauthorized act which it had not the power itself to make, or has not the power at the time of the ratification.⁴

An act done in violation of law or public policy cannot be ratified.⁵

In *Supervisors v. Schenck*, 5 Wall. 772, 781, the court said :

“Questions of ratification most frequently arise in respect to the acts or omissions of agents, but the general rule is the same in all cases where the act done was one which it was competent for the party attempted to be charged to do.

“When the principal, upon a full knowledge of all the circumstances of the case, deliberately ratified the acts, doings, or omissions of his agent, he will be bound thereby as fully to all intents and purposes as if he had originally given him direct authority in the premises to the extent to which such acts, doings, or omissions reach.

“Ratification is inoperative if the party attempted to be charged was not competent to make the contract in question when the same was made, nor when the supposed acts of ratification were performed, or if the contract was ille-

N. Y. 584; *Pana v. Lippencott*, 2 Iowa, 48; *Loan Asso. v. Topeka*, Ill. App. 466; *Young v. Board of* 20 Wall. 655.

Education Ind. School Dist. No. 47, (Minn.) 55 N. W. Rep. 1112. ³ *Supervisors v. Schenck*, 5 Wall. 772-781.

¹ *Bolles v. Brumfield*, 120 U. S. 739; *Granada Co. v. Brodgen*, 112 U. S. 261. ⁴ *Meechem on Public Officers*, § 529.

⁵ *Highway Com. v. Van Dusen*,

² *McPherson v. Fiske Bros.*, 43 40 Mich. 339; *Green v. Cape May*, 41 N. J. L. 45.

gal, immoral or against public policy. Like an individual, a corporation may ratify the acts of its agents done in the excess of authority, and such ratification may, in many cases, be inferred from acquiescence in those acts, as well as from express adoption. Such ratification may be by express consent, or by acts and conduct of the principal inconsistent with any other hypothesis than that he approved, and intended to adopt what has been done in his name, and it was held, in *Peterson v. Mayor of New York*, that the principle is as applicable to corporations as to individuals.

“Where the officers of the corporation openly exercised powers affecting the interest of third persons, which presupposes a delegated authority for the purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful and the delegated authority will be presumed.”

§ 248. **Principle upon which these estoppels rest.**—The principle upon which the municipal corporation in the cases of estoppel just discussed, which are those other than by recitals contained in the bonds or by the records of the proceedings relative to the issue of the bonds or other municipal negotiable paper, rests upon the equitable rule that the corporation, by its acts, the issue of the bonds, or the payment of interest thereon or the principal of some, or the retention of the consideration, as where it received stock and retains it, and other like cases, assures all innocent holders that the conditions precedent upon which the bonds were to issue have happened and been performed, and that the bonds or other paper were issued after the municipality was satisfied of the performance thereof, or that the state of facts upon which the paper was to be issued existed when it was issued. The courts will not permit the municipal corporation after these continued affirmative acts to say, in a suit brought by a *bona fide* holder to enforce the payment of the principal or interest of such paper, that the paper was, in fact, irregularly issued, unless it had no power to issue the paper. If it had the power to issue the paper, then such

acts work an estoppel, and irregularities in the exercise of the power cannot be set up as a defence against the *bona fide* holder of the paper.

The taxpayer is also estopped in such cases to question the paper, the acts of the officers of the corporation being deemed his acts, they being his agents. If he acts at all, he must either restrain the issue or bring a suit to enforce the surrender of the issue before the paper reaches the hands of a *bona fide* holder, whom the corporation by payment of interest or principal has induced to purchase. If he sits still in the meantime, his laches and acquiescence will be deemed to work an estoppel against him.

§ 249. **General Rule—Estoppel by judgment—*Res adjudicata*.**—The general rule of estoppel by former judgment is that a judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit between the same parties or their privies, upon the same cause of action, so long as it remains unreversed,¹ and the defendant may plead that the plaintiff recovered a judgment against him upon the very same cause of action upon which he now sues; or that in the former suit on the same cause of action, he, the defendant, then recovered judgment, and the plaintiff may show that in a former suit involving the same merits, he recovered a judgment against the defendant, in which case the defendant is estopped from setting up in the new suit any defence he made or might have made in the first suit.

Applying the doctrine of estoppel by former judgment to actions upon bonds and coupons, it has been held that where judgment for the defendant has been given on demurrer in an action on the coupons of bonds, on the ground that the cause of action was barred by the statute of limitations, such judgment is *res adjudicata* between the parties or their privies in a second suit on the bonds, in which judgment is also demanded for the amount of the coupons.²

It has been held that where the holder of a number of

¹ Black on Judgments, § 504.

² *Edwards v. Bates Co.*, 55 Fed. Rep. 436.

bonds of the same issue brings suit upon a part of them and a judgment is rendered against him, that in a subsequent suit upon the remainder the former judgment may be set up as a bar.¹

In *Beloit v. Morgan*, 7 Wall. 619, which is a case in point, Mr. Justice Swayne said :

“ The parties were identical and the title involved the same. All the objections taken in this case might have been taken in that. . . . The court had full jurisdiction over the parties and the subject.

“ Under such circumstances a judgment is conclusive not only as to the *res* of that case, but as to all further litigation between the same parties touching the same subject matter, though the *res* itself may be different.”

§ 250. **Doctrine modified—Cases.**—The Supreme Court of the United States, however, in *Cromwell v. Sac Co.*, 96 U. S. 51, has limited this broad doctrine, and has held that the former judgment must have been rendered, not only upon the bonds of the same issue but upon the same points as are raised in the second action. In the first action,² on a part of the bonds, the bonds were held void for fraud and illegality, the plaintiff not showing himself to be a *bona fide* holder. In the present suit on other bonds of the same issue the plaintiff offered to show that he was a *bona fide* holder for value of the bonds sued on. The court below refused to permit such evidence and held the former judgment, which was pleaded, conclusive.

The Supreme Court held that such evidence should have been admitted, and set aside the decision of the lower court, and held that when the subsequent suit is between the same parties, but upon a different claim, the judgment in the first suit operates only as an estoppel when the points in issue or controverted are the same.

The United States Supreme Court, in the case of *Nesbit v. Riverside Independent District*, 144 U. S. 610, followed the modified rule laid down in *Cromwell v. Sac Co.*, and refused to follow the strict doctrine of *Beloit v. Morgan*.

¹ *Daly v. Brown*, 4 N. Y. 71 : | ² *Smith v. Sac Co.*, 11 Wall. 139.
Babcock v. Comp., 12 Ohio St. 11. |

In this case the plaintiff in error was the holder of five bonds made by the defendant. The bonds exceeded the constitutional limitation of debt. In a former suit, brought by the plaintiff in the United States Circuit Court at Des Moines, Iowa, on coupons detached from two of the bonds, judgment was rendered in favor of the plaintiff, the court resting its judgment upon the recitals in the bonds holding that they estopped the municipality from showing that the issue of the bonds was in excess of the limitation. The Supreme Court held that each matured coupon upon a negotiable bond is a separable promise, distinct from the promise to pay the bonds or other coupons, and gives rise to a separate cause of action, and that when the second suit is upon other coupons, or on the bonds themselves, though between the same parties, the judgment in the former suit operates as an estoppel, *only as to the point or question actually litigated and determined*, and not as to other matters which might have been litigated and determined.

The court also held that the defendant was not estopped by the former judgment from showing in the present case that in addition to the facts presented in the former suit, the fact that the holder of the bonds had notice of their invalidity and the further fact that the bonds themselves created an over-issue.

§ 251. Cases.—In the case of *Bissel v. Spring Valley Township*, 124 U. S. 225, the court laid down the doctrine that although the claim in the subsequent suit is a different one, yet, if it is between the same parties, the former judgment will conclude the parties in the subsequent suit as to the matter litigated and determined in the former suit.

In this case, the plaintiff in error was also the plaintiff in a former suit to recover upon coupons detached from seventy-three bonds of the denominations of \$1,000 each. The defence in the suit on the coupons was that the bonds had not been signed by the officer of the municipality or by any other person for him.

The facts were presented by demurrer. The court found for the municipality. The subsequent suit, the one

above referred to, was brought upon other coupons detached from the same bonds and the defence was *res adjudicata*, and the record of the former action was introduced in evidence.

The plaintiff offered to prove the due execution of the bonds and that he was a *bona fide* holder without notice. The court refused to permit such evidence to be offered and gave judgment for the municipality.

Justice Field, delivering the opinion of the court, said :

“ In *Cromwell v. Sac Co.*, 94 U. S. 351, we drew a distinction between the effect of a judgment as a bar or estoppel against the prosecution of a second action between the same parties upon a different claim or demand. In the latter case, which is the one before us, we held, following numerous decisions to that effect, that the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. The inquiry in such case, therefore, must always be as to the point or question actually litigated and determined in the original action, for only upon such matters is the judgment conclusive in another action between the parties upon a different demand.”

The court distinguished this case from *Cromwell v. Sac Co.*

The Court of Chancery, in the State of New Jersey, in a suit brought by a municipal corporation to compel the surrender for cancellation of its bonds by the executrix of a deceased testator, who had in his lifetime brought suit upon some of the matured coupons of the same in the Supreme Court, which suit was decided against him, it appearing in the suit that the bonds had been lost by a former holder and the defendant, the testator, was unable to prove himself a *bona fide* holder, held the former judgment, which was pleaded, to be sufficient evidence to compel the surrender of the bonds, especially as no proof was offered by the executrix to show that the testator had been a *bona fide* holder of the bonds.¹

§ 252. **Doctrine of estoppel applies to non-negotiable**

¹ Mayor etc. of Paterson v. Baker, 26 Atl. Rep. 324.
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paper.—The doctrine of estoppel by recitals contained in municipal paper, or by the judgment and determination of the municipal officers or body charged with the duty of issuing the paper to be found in the record of the proceedings of such officers or body, or any other mode of estoppel, applies as well to non-negotiable as negotiable paper, although in most of the cases where the doctrine of estoppel has been so applied the paper was negotiable, yet negotiability has no necessary connection with the doctrine, as the principle of estoppel by the acts of a corporation or its authorized agents will apply as fully to a promise to pay, non-negotiable in form, as to one that is negotiable. It is the doing of the act or the making of the statement or the determination of the question which estops the corporation from disputing or denying the performance of the act, or of showing that the statement is false, or that the prior determination of the question was a mistaken one to the prejudice of a person who, without knowledge of the true circumstances, has been so led to part with his money and receive in exchange for it the municipal paper whether negotiable or not.¹

§ 253. **When bonds are void for non-performance of conditions precedent.**—When the statute authorizing the issue of the bonds declares in express terms that unless the conditions precedent are performed the bonds shall not be issued, or shall not be binding obligations, such bonds, if issued, and the conditions necessary to be performed prior to their issue are not in fact performed, *are void* in the hands of even a *bona fide* holder notwithstanding any recitals.²

Bonds issued under such statutes are not valid and binding because of the express provisions of the statute, of which, of course, all persons are bound to take notice, and until the conditions are performed the municipality has not the power to issue the bonds, and if issued without the performance of the conditions imposed by the statute there is a want of power to issue, and as a want

¹ Burroughs on Pub. Securities, 498. Some State constitutions have same provision.

² Jeffries v. Lawrence, 42 Iowa,

of power is a good defence against a *bona fide* holder, notwithstanding any recitals in the bonds, such bonds are void.

§ 254. **Same—Cases.**—In case of *Anthony v. Jasper Co.*, 101 U. S. 693, where the statute under which the bonds in suit were issued required that before the bonds should obtain validity or be negotiated they should be registered by the State auditor, the bonds were not so registered and were held to be void for such failure.

Chief Justice Waite said in part: “Dealers in municipal bonds are charged with notice of the laws of the State granting authority to make the bonds they find on the market.

“This we have always held. If the power exists in the municipality the *bona fide* holder is protected against mere irregularities in the manner of its execution, but if there is a want of power, no legal liability can be created. When the bonds in question were put out the law required that, to be valid, they must be certified to by the auditor; in other words, the officer was to certify them before their execution was complete, so as to bind the public for their payment.”

The case of *Town of Eagle v. Kohn*, 84 Ill. 292, is another case further illustrating the point.

A suit against the town of Eagle was brought by an innocent holder for value to recover on coupons cut from bonds issued by the town to a railroad company, Dec. 1st, 1870, in payment for stock in a railroad pursuant to a vote of the legal voters of the town.

In that vote certain conditions as to time had been prescribed upon which the bonds should be issued. Those conditions had not been complied with.

The question arose in the case whether the declaration of the statute that the bonds should not be valid and binding until such conditions precedent should have been complied with, was to be confined in its operation to the railroad company to which the bonds should have been issued, or whether it extended to innocent holders for value. The court held that although the statute did not declare that the bonds should be void, *its declaration*

that they should not be valid and binding until the conditions precedent should have been complied with, was an imperative and peremptory declaration that the bonds should not be valid and binding until the conditions named should have been complied with, even in the hands of innocent holders without notice.

This latter case was followed in *German Savings Bank v. Franklin*, 128 U. S. 526, in a suit to enforce bonds issued under the same statute.

It has been held, however, that the statutory conditions may be complied with after the issue of the bonds in cases of this kind, and that such compliance will render the bonds valid.¹

§ 255. **Statute or constitution renders the bonds void.**—The non-performance of conditions precedent, which render the bonds invalid in the hands of all persons referred to above, has such force and effect by reason of the statute under which they are issued, although some general law relating to the issue of bonds, or the constitution of the State, may in like manner render bonds invalid unless the conditions precedent are performed.

In this class of municipal paper the doctrine of estoppel has no application, because the provision that such paper shall be invalid unless the conditions are performed, affects the very power of the corporation to issue them, and where there is want of power to issue bonds or other paper they are void in all hands, as elsewhere shown.²

§ 256. **Curative acts** — When such acts may be passed.—The aid of the Legislature is very frequently invoked to cure, by a subsequent law, some irregularity or omission in the precedent conditions of the issue of bonds, or in their execution, and to make them valid obligations when they otherwise would be invalid, and all such curative acts are valid unless prohibited by the constitution.³ It has been so often held, that there is

¹ *Town of Eagle v. Kohn*, 84 Ill. 292; *Thomas v. Morgan*, 59 Ill. 479.

² See subject *Want of Power*.

³ *Oteo Co. v. Baldwin*, 111 U. S. 1; *Granada Co. v. Brogden*, 112

U. S. 261; *Bolles v. Brumfield*, 120

now no question about it, that the Legislature may pass acts to validate bonds and other evidence of debt issued by municipalities, which were not legally binding upon them because of some defect in the execution of the power or failure to follow or perform some of the conditions precedent, unless the defect be constitutional.¹

Cooley, in his admirable work on "Constitutional Limitations," sec. 371, has expressed the law on this subject in the following concise language :

"The rule applicable to cases of this description is substantially the following :

"If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the Legislature might make immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."

§ 257. **Same—Constitutional defect cannot be so cured.**—Laws passed to remedy the defective execution of powers, when intended to carry out the manifest intention of the parties, and not affecting vested rights, are not unconstitutional though retroactive.²

The act validated must be such as the Legislature might previously have authorized. It cannot make good by a retrospective act a former unconstitutional act.³

U. S. 759; Kunkle v. Franklin, 13 Saline Co. Ct., 48 Mo. 390; State Minn. 127; Keithsburg v. Frick, 31 v. Newark, 3 Dutch. (N. J.) 187; Ill. 405; Dows v. Elmwood, 34 Fed. Black's Constitutional Law, p. 545; Rep. 114; Nolan Co. v. State, 17 S. Dill on Mun. Corp. (4th ed.) §§ W. R. 823; Quincy v. Cook, 107 U. S. 77-79.

549; Read v. Plattsburgh, 10 Vt. 568; Ritchie v. Franklin Co., 22 Wall. 67; Marshall v. Schenck, 5 Wall. 776; Mattingly v. Dist. of Colum-¹ Bass v. Columbus, 20 Ga. 484; MeMillin v. Co. Judge, 6 Iowa, 390; Deyo v. Oteo Co., 37 Fed. Rep. 246.

bia, 97 U. S. 687; Kenosha v. Lam-² State v. Newark, 27 N. J. L. 185.

son, 9 Wall. 477; Winn v. Mecon,³ Kimball v. Rosenthal, (Sup. Ct. Wis.) 5 Cent. Law Journal 372. 21 Ga. 275; Atchison etc. R. Co. v. Jefferson Co., 17 Kan. 29; State v. See, however, § 260 and note.

In case of irregularities, the Legislature may generally validate bonds which would be otherwise invalid,¹ if the Legislature could have ordered or authorized the issue of the bonds in the first place,² and no constitutional prohibition has intervened.³ And it has been held that the Legislature may ratify the issue of bonds for which there was absolutely no authority for their issue,⁴ provided, of course, there were no constitutional objections.

Laws of this character are favored by the courts, so long as no rights of third persons are unjustly affected.⁵

The mistakes or irregularities to be cured need not be cured by the direct act of the Legislature, but the act may be so drawn as to leave it optional with the legislative body or the voters of the municipality to determine whether the mistake or irregularity shall be cured.⁶

The Federal courts have held bonds to be valid when ratified by an act of the Legislature, not prohibited by the constitution, though the Supreme Court of the State, after the act was passed and the bonds issued, decided adverse to the doctrine.⁷

§ 258. **Cases illustrating the doctrine.**—In the case of *Town of Duanesburgh v. Jenkins*, Com'r, 57 N. Y. 177, it appeared that a commissioner, acting for the town, was authorized to execute and deliver the bonds and subscribe for stock upon certain consents of the taxpayers being obtained and proofs filed. The proofs were defective, but the commissioner issued the bonds. Afterwards an act was passed, declaring that where bonds had been issued by the commissioner of a town, and the railroad shall have been constructed through the town, the bonds should be valid and binding upon the town, without reference to the sufficiency of the proof,

¹ *Granada Co. v. Brodgen*, 112 U. S. 261.

⁵ *St. Joseph v. Rogers*, 16 Wall. 666.

² *Duke v. Williamsburg Co.*, 21 S. C. 414; *Quincy v. Cook*, 107 U. S. 549.

⁶ *Bissell v. Jeffersonville*, 24 How. 287-295.

³ *Jonesboro v. Cairo etc. R. R. Co.*, 110 U. S. 192.

⁷ *Dows v. Elmwood*, 31 Fed. Rep. 114; *Bolles v. Brinfield*, 120 U. S. 759.

⁴ *Kenosha v. Lawson*, 9 Wall. 77; *Lée Co. v. Rodgers*, 7 Ib. 181.

and the amount should be levied, raised and paid as provided in the original act. The court held the Legislature could release the prior condition, and the bonds were binding upon the town.

The court said : "The measure of consent on the part of the town and its taxpayers or electors was fixed at the will of the Legislature originally, . . . and if it originally rested with the Legislature to fix the terms on which the town might act, the same power will suffice to remit a part of the conditions imposed, or to heal any defects which might have occurred in the performance by the town of those conditions."

In the case of *Oteo County v. Baldwin*, 111 U. S. 1, the court said :

"As the Legislature had power to authorize the issue of bonds without any precedent action of the voters of the county, it could validate the issue of the bonds by curing and legalizing defects in respect to voting. The bonds were assigned by the railroad company, and came to the plaintiff after the acts of 1869 were passed, and he became a *bona fide* holder of them on the faith of those acts. The doctrine is well settled in this court, that the Legislature of a State, unless restrained by its organic law, has the right to authorize the municipal corporation to issue bonds in aid of a railroad, and to levy a tax to pay the bonds and interest on them, with or without a popular vote; and to cure, by a retrospective act, irregularities in the exercise of the power conferred. *Thompson v. Lee County*, 3 Wall. 329; *Campbell v. City of Kenosha*, *Id.* 194."

The United States Supreme Court has held that a Legislature may pass a curative act, validating bonds issued by a municipal corporation, where the defect consisted in the fact that the submission of the question as to whether or not they should be issued was under the wrong act.¹ Also where the vote was taken upon the wrong day.² But where the retroactive act attempts to

¹ *Campbell v. Kenosha*, 5 Wall. 194.

² *St. Joseph v. Rogers*, 16 Wall. 663.

change the character of the bonds in form and substance, or to impose new burdens, or alters the original contract, it has been held to be unconstitutional, because it impairs the obligation of the original contract.¹

§ 259. **What may be cured.**—If the contract is one which the Legislature might originally have authorized, the case falls within the principle above laid down, and the right of the Legislature to confirm it must be recognized ; but the Legislature cannot compel a municipality, by a retrospective act, to issue bonds or cure a defective issue for purposes purely local without the consent of the municipality.²

When the securities have been issued by the wrong officer or agent, the Legislature has the power to confer upon the officer or agent who was to issue them the power to ratify them.³

And where bonds or other negotiable paper are issued bearing a greater rate of interest than allowed by law, or are voidable under a statute, because sold for less than par, the Legislature, by a subsequent act, can cure all such statutory defects and purge such contracts of usury.⁴

As before stated, the defects sought to be validated by the subsequent legislation must be such that the Legislature in the first place could have waived, and the object of the act must not be such as is prohibited by the constitution.

It has been held that an act legalizing void bonds, void because the city when it issued them did not have the power so to do, was not a special act conferring corporate powers, contrary to the constitution of Nebraska ; that such an act, though special in form, did not confer corporate powers ; that the statute operated upon the transaction itself, which had already previously been

¹ Commissioners of Shawnee Co. v. Barton Co. v. Walker, 47 Mo. v. Carter, 2 Kan. 134 ; New Orleans v. Bissell v. Jeffersonville, 24 v. Clark, 95 U. S. 641 ; Bissell v. How, 295.
² Jeffersonville, 24 How. 287-295.
³ Herman v. Goodyear, 56 Conn.

⁴ Hasbrook v. Milwaukee, 1 Wis. 210 ; Bain v. Savage, 76 Va. 901.

consummated; that it operated upon the rights of the parties as determined by the equity of their circumstances.¹

It has been held in Illinois that the Legislature could not validate bonds which were void because the election was called and ordered by the wrong officers.² The United States courts have, however, as elsewhere shown, held bonds to be valid in the hands of *bona fide* holders, although the election was called by the wrong officers.³

The Legislature cannot by a subsequent act make valid bonds which were issued without the consent of the people, if such consent is a prerequisite of the constitution,⁴ as, for instance, where the constitution required that before bonds could be donated to a railroad company an affirmative vote of the people must be had, and the bonds are donated without such vote, a subsequent act cannot be passed which will validate such bonds.⁵

§ 260. **When an unconstitutional act may be cured.**—If the act under which the bonds or other municipal paper are issued is unconstitutional only as to the form in which it is drafted, and the object of the act is not prohibited by the constitution, the bonds or other paper may be validated by a subsequent act so drafted as to avoid the unconstitutional form of the prior act, as if, for instance, the Legislature by a special act, and for that reason unconstitutional, because the constitution required all acts relating to the internal affairs of municipalities to be general, empowered a municipality to make some local improvement, such as the construction

¹ Read v. Plattsmonth, 107 U. S. 568.

² Gaddis v. Richard Co., 92 Ill. 119.

³ See § 68.

⁴ Horten v. Town of Thompson, 71 N. Y. 513; County of Tipton v. Loco Works, 103 U. S. 522.

⁵ Choisser v. People, 110 Ill. 21; Post v. Pulaski Co., 49 Fed. Rep. 628. In the former case the proposition submitted to the people was to subscribe to stock of a railroad,

and not to donate bonds. Of the amendatory act, the court said, "In the present case the amendatory act of 1869, if effectual, at all, can be held to operate by way of validating a contract for a donation, which by reason of want of power, as well as the absence of either an intention or opportunity on the part of the legal voters of the county to give their consent was *ultra vires* and void."

of a sewer or the erection of a public building, and to issue bonds in order to pay for the same, the object of the act being within the power of the Legislature and the constitutional objection being only as to the form of the enabling act, a subsequent act could be passed, general in form, which would validate the bonds.¹

The curative act should be concise and to the point, and should be broad enough to cover the mistake sought to be cured, in plain and clear language.

And the intention to validate the bonds must appear from the act itself.

Where a municipal corporation incurs a legal liability under an unconstitutional statute, the curative statute should be so drawn as to impose the debt upon the corporation, and not attempt to validate the original unconstitutional statute.²

¹ State v. Whiteside, 9 N. E. R. 661; Grannis v. Cherokee Tp., 47 Fed. Rep. 427; State v. City of Cincinnati, 40 N. E. R. 508.

In this case the first section of the original statute was unconstitutional, because special in its operation, the word "present" rendering it so. The first section was amended with the word "present" omitted. The court held that the whole statute, after amendment, had the same effect as if re-enacted with the amendment, and that hence an unconstitutional statute may be enacted into a constitutional one, so far as its future operation is concerned by removing its objectionable provisions or supplying others to conform it to the requirements of the constitution.

Where the voters before they have authority to vote to issue

bonds, do so, and the question is decided in the affirmative, the statute or constitution requiring a vote before the issue, the Legislature by a proper act can ratify the election and authorize the issue in the same manner as if the act had been authorized by the Legislature in the first instance. Dowes v. Elmwood, 31 Fed. Rep. 114, 118; Bolles v. Brimfield, 120 U. S. 759. Bonds issued under an unconstitutional act are proper subjects of compromise, if their issue was not for an unconstitutional purpose, and new bonds issued in their stead under a constitutional act are valid. State v. Hannibal & St. J. R. R. Co., (Mo.) 11 S. W. R. 746.

² State *ex rel.* Dickinson v. Neely, 30 S. C. 587; 9 S. E. R. 661; Grannis v. Cherokee Tp. of York Co., 17 Fed. Rep. 427.

CHAPTER XVII.

RAILROAD AID BONDS.

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§ 261. **Railroad aid bonds—Their purpose.**—These bonds are issued to aid in the construction of railroads by municipal corporations in order to develop the resources of the municipality and the surrounding country in opening markets and increasing trade and facilitating travel to and from the municipality giving the aid and other cities and towns.

There can be no question but that the aid thus extended has immeasurably helped to develop the general business and resources of the country, and many railroads have been thus built that would not otherwise have been.

But like any other unlimited power it became abused in time, and schemers finding that all that was necessary to obtain such aid was to have passed a legislative act authorizing a municipal corporation to issue its bonds to help build a proposed road, or to assist one already constructed on the verge of bankruptcy, made it a practice to have such laws enacted and then induce the officers of a municipal corporation, either by misrepresentation or actual bribery, to issue bonds for the construction of railroads, which in some cases were never constructed, or if constructed, then so poorly or through such an impoverished country that the roads were forced to suspend operations, and pass into other hands, while the projectors operated in their stock.

By these and other fraudulent means, or by reason of lending their aid to unnecessary roads, the municipal debt became so alarmingly large that the people of many

of the States found it necessary, in order to protect themselves from their own lawmakers, to so amend their respective State constitutions as to either prohibit entirely any such aid or to surround the same with such limitations upon the legislative power, usually the prior consent of the taxpayers of the municipality, as would tend to check, if not entirely prohibit, the giving of such aid.

§ 262. **Summary of State constitutions respecting such aid.**—The following is a summary of the constitutions of the States respecting the power of the various States to aid railroads, as found in their respective present constitutions, showing those States that are entirely prohibited to render such aid; those that, while authorizing aid, the aid is limited, and those where their constitutions do not prohibit or limit such powers.

Alabama : Neither the State or any subdivision can aid a railroad.

Arkansas : Prohibits the State or any subdivision to loan its credit for any purpose whatsoever.

California (art. 4, sec. 31) : Prohibits the Legislature from passing laws which permit the State or any subdivision of it from loaning its credit or aiding any person, association or corporation, municipal or otherwise, or from subscribing to stock or becoming a stockholder in any corporation.

Colorado (art. 11, sec. 1 and 2) : Prohibits the State or any subdivision to lend or pledge its credit in any manner or in aid of any person, company or corporation or to make a donation to, or to subscribe to the stock of, a corporation or company.

Connecticut : No county, city, town, borough or other municipality shall ever subscribe to the capital stock of any railroad corporation, or purchase its bonds, or make donations to, or loan its credit, directly or indirectly, in aid of any such corporation. Existing bonds or debts prior to the adoption of the constitutional inhibition not to be affected, and additional aid may be rendered to protect former aid given.

Delaware : No limitations.

Florida : The State is prohibited from granting aid to

railroad companies, and the Legislature from authorizing any county, city, borough, township or incorporated district to become a stockholder in, or aid or loan its credit to, any company or individual (art. 3, sec. 7).

Georgia : Same as Florida (art. 7, secs. 5 and 6).

Illinois : Neither the State nor any county, city, town, township or other municipality can subscribe to the stock of, or issue bonds to pay for stock, of a railroad company or private corporation, or aid such company or corporation. The prohibition not to affect subscriptions which had been authorized and voted for under existing laws (art. 4, sec. 20 ; art. 8, sec. 3 and amendment).

Indiana : Counties only are prohibited from subscribing for stock of and issuing bonds to pay therefor, or lending their credit to railroad companies (art. 10, sec. 6).

Iowa : The *State* cannot loan its credit in aid of any individual, association or corporation, or become a stockholder in any association or corporation, or become responsible for debts of an association or corporation unless incurred in time of war for the benefit of the State (art. 7, sec. 1 ; art. 8, sec. 3).

Under a statute of 1880, secs. 554-555, subscriptions by a municipal corporation to a railroad company's capital stock thereafter made, shall be null and void, and no assignment of them shall give them validity. This, of course, could be repealed, and then aid could be given, as aid to railroad companies has been held to be constitutional by the courts of the State (*Steward v. Board of Sup.*, 30 Iowa, 9).

Kansas : The constitution contains no limitation upon aid to railroads, and authority to grant aid by donation or subscription and issue bonds by municipal corporation will be found under a general statute which requires that whenever two-fifths of the resident taxpayers of a municipality petition that aid be given, then the question is to be submitted to a vote of the people, etc. For the course to be pursued see Laws 1876, chap. 1887 ; also see chap. 141, Laws 1877, for aid to narrow gauge railroads.

Kentucky : No constitutional prohibition against municipal aid.

Louisiana : The State cannot aid a railroad or contract or authorize the contraction of a debt except to repel an invasion or to suppress an insurrection. And no subdivision of the State can aid or assist any corporation or association whatsoever, or purchase or subscribe to the stock of any corporation or association (art. 56).

Maine : The credit of the State shall not be, directly or indirectly, loaned. Municipal corporations are not prohibited from aiding railroad companies ; but no debt or liability can be incurred which, with previous debts, shall exceed five per centum of the last regular valuation of the municipal corporation (art. 22, amendment of 1877).

Maryland : Municipalities are not prohibited from aiding a railroad, but counties can give or loan their aid only when authorized by an act of the General Assembly, which shall be published for two months before the next election for members of the House of Delegates in the newspaper published in the county, and said act shall also be approved by a majority of all the members of the General Assembly at its next session after said election (sec. 54). The State cannot directly or indirectly aid a private corporation.

Massachusetts : There are no constitutional limitations of debt for State, county or city purposes. Aid to railroads may be given by either.

Michigan : The credit of the State shall not be granted to or in aid of any person, association or corporation (art. 14, sec. 6). Municipalities are not prohibited by the constitution from granting such aid, but the courts of the State have uniformly held such aid unconstitutional.

Minnesota : The credit of the State cannot be given to aid any person or corporation. The Legislature of the State cannot authorize a municipal corporation to become indebted to aid a railroad to an amount that shall exceed five per centum of the value of the taxable property as shown by the last assessment.

Mississippi : The State is prohibited from aiding by pledge or loan any person, association or corporation, or to become a stockholder in an association or corporation.

The Legislature is prohibited from authorizing municipalities to loan moneys or grant aid to railroads (Constitution 1890, secs. 66, 183, 258.)

Missouri : Municipalities cannot aid railroads (Const. 1875, art. 9, sec. 6).

Montana : No constitutional prohibition against such aid.

Nebraska : State cannot loan its aid. Municipalities cannot be a stockholder or subscribe for stock, but may make a donation if approved by the qualified voters at an election (see art. 12, sec. 2).

Nevada : The State cannot assist railroad corporations, nor can any county, city, town or other municipality.

New Hampshire : Neither the State nor any subdivision can aid a private corporation or association.

New Jersey : Neither the State nor any subdivision thereof can give money or property, or loan its credit or money to, or in aid of, individuals, associations or corporations, or become security for, or be directly or indirectly the owner of, any stock or bonds in such association or corporation (art. 1, sec. 19), Amended Const. 1875.

New York : Neither the State nor any subdivision can directly or indirectly aid a railroad company (Amended Const. 1874, (art. 8, sec. 10).

North Carolina : Municipalities may aid a railroad with the consent of the taxpayers (art. 8, sec. 7).

North Dakota : No prohibition as to municipalities except on limit of debt.

Ohio : The State cannot aid a railroad nor can the Legislature authorize municipal corporations to do so (art. 8, sec. 4 and 6).

Oregon : No prohibition except as to limit of debt.

Pennsylvania : Neither the State nor a subdivision can aid a railroad.

Rhode Island : No prohibition against such aid, but restrictions.

South Carolina : State aid requires consent of the people. No restrictions as to municipalities.

South Dakota : No constitutional prohibition as to aid railroads.

Tennessee : Municipal aid may be given to railroads provided the proposition be submitted to the voters and it receive three-fourths of the votes cast at the election (art. 2, sec. 29).

Texas : Aid by the State or any subdivision is prohibited.

Vermont : No constitutional prohibitions.

Virginia : The *State* cannot assist railroads. No constitutional prohibition as to cities, counties, towns, etc.

West Virginia : The *State* cannot aid railroads. There is no constitutional prohibition against such aid by municipalities aiding railroads.

Wisconsin : The State is prohibited to aid a railroad company, but the constitution contains no such prohibition as to municipal corporations, and such aid has often been authorized by statute (Laws 1872, ch. 182 ; Laws 1873, ch. 277--289 ; Laws 1874, ch. 317).

Wyoming : No constitutional prohibition, but amount of indebtedness is limited.

The Territories cannot aid a railroad (Act of Congress, July 30th, 1886).

See the extracts from the State constitution appended to this volume.

The constitutions of some of the States as above shown prohibit the municipal corporations themselves to lend such aid, while in others the prohibition is directed to the Legislature and prohibits it from authorizing municipalities to lend their aid. In the former case, as we have elsewhere seen, such constitutional prohibitions act at once upon the municipality, and it cannot thereafter give such aid except to carry out vested rights.¹ And when the prohibition is directed to the Legislature it does not repeal existing statutes which permit municipal corporations to lend such assistance, but is prospective and operates only upon the future acts of the Legislature.²

² Sweet v. Syracuse, 27 N. E. R.

¹ Norton v. Brownsville, 129 U. S. 1081 ; Moultrie v. Fairfield, 104 U. S. 370 ; Gillam v. Davies Co., 14 S. W. R. 838.

ard, 464.

§ 263. **Power must be express.**—It is now settled that without legislative authority a municipal corporation has not the power to lend its aid to assist a railroad company.¹ And this power must be in express language authorizing it to subscribe for the stock and issue its negotiable bonds, or to donate its bonds, or in such language that the power to issue the bonds will be implied as a necessary adjunct to carry out the object of the act.² But when the power to levy and collect taxes is, in connection with the power to aid the railroad, conferred by the act, then the implication will be excluded.³ And where a statute authorized towns to subscribe for shares in the capital stock of a railroad company and to raise *by loans or taxes* the money required to pay the instalments of the subscription, such authority was held to confer on the town by implication, the power to issue bonds.⁴ Authority to a municipal corporation to subscribe for stock in a railroad company, “as fully as an individual,” authorizes the corporation to issue negotiable bonds in payment of the stock.⁵

Power in a town to subscribe for stock in a railroad company does not include power to issue municipal bonds in payment of the subscription when the act contemplates payment by taxes.⁶

An act authorizing any municipality to issue and deliver bonds is applicable to any municipality that may subsequently be incorporated.⁷

The enabling act must contain authority to grant the aid and issue the bonds in express words or the authority.

¹ Norton v. Dyersberg, 127 U. S. Ins. Co., 82 Ill. 562; Lippencott v. 139; Concord v. Robinson, 121 Ib. Pana, 92 Ill. 21.
165; Jones on R. R. Securities, §§ 4 Commonwealth v. Williamstown, (Mass.) 30 N. E. R. 472.

² Mayor etc. v. Inman, 57 Ga. 370; ⁵ Commonwealth v. Pittsburgh, 41 Pa. St. 278.
Vicksburg v. Lombard, 51 Miss. 111.

³ Claiborne Co. v. Brooks, 111 U. S. 406; Wells v. Pontotac Co. Sup., 102 U. S. 632; Ogden Co. v. U. S. 172.
Davies, 102 U. S. 601. Bonds in

⁷ Long v. New London, 5 Fed. Rep. 559.
such cases are invalid, if issued. Town of Middleport v. Etna Life

to borrow or donate such aid, or subscribe to the stock, must be given, from which the authority to issue the bonds will be implied.¹ There must be express authority to aid the railroad, a few cases, however, hold the opposite doctrine.²

§ 264. **Early cases in federal courts.**—In the United States Courts in a few cases negotiable bonds were issued to aid railroads when there was no express authority so to do.

In case of *Meyer v. Muscatine*, 1 Wall. 384, the charter of that city gave it power "to borrow money for any object in its discretion." Under this power the city issued its negotiable bonds in aid of a railroad, and the bonds were declared valid under the said power. In another case, *Rogers v. Burlington*, 3 Wall. 654, bonds issued under authority of the charter which provided. "That whenever, in the opinion of the city council, it is expedient to borrow money for any public purpose the question shall be submitted to the voters," etc.

The proposition to aid a railroad by the issue of bonds was submitted to the citizens and decided in the affirmative. The bonds were then issued and were held valid. The court considered the building of the road a public purpose for which it might, under its charter, borrow money. In this case the bonds were given directly to the railroad aided and no money was borrowed on them by the city.

A vigorous dissenting opinion was filed by Field, J., which was concurred in by Chief Justice Chase and Justices Miller and Grier, and their principal objection was that the bonds were not sold and no money borrowed, but that they were loaned to the railroad company, and that borrowing money and loaning credit were not convertible terms, although they also dissented because, in their opinion, a municipal corporation could

¹ *Commonwealth etc. v. Pitts-* See cases *Am. & Eng. Ency. of*
burgh, 41 Pa. St. 278; *Rienman v.* *Law*, Vol. 15: p. 1242; *Dill. on*
Covington R. R., 7 Neb. 310; *Harc-* *Mun. Corp.* § 161 (4th ed.) notes.
court v. Good, 39 Tex. 456; *Wil-*
liams v. Duaneburgh, 66 N. Y. 129. ² *Copes v. Charleston*, 10 Rich. S. C.) 491.

not aid a railroad unless specially authorized so to do by statute.

§ 265. **Early cases overruled—Power must be express.**—These cases have since been overruled, and in the case of *Young v. Clarendon Township*, 132 U. S. 340, it was held to be the settled law that a municipality has no power to issue its bonds in aid of a railroad, except by legislative permission.

And in the case of *Brenham v. German American Bank*, 144 U. S. 173, where it appeared the city of Brenham, under a provision of its charter, had power to borrow for general purposes, a sum not exceeding \$15,000 on the credit of the city, issued negotiable bonds for said sum, \$12,000 of which were sold and the proceeds devoted to aid a railroad, the court held all the bonds to be invalid, because express authority to issue negotiable bonds was not conferred, and further held that the cases of *Rogers v. Burlington*, *supra*, and that of *Mitchell v. Burlington*, 4 Wall. 270, wherein the former case was affirmed, were both overruled. The court cited with approval a number of cases which held that a municipal corporation must have legislative authority to aid a railroad, and that the power to subscribe for stock did not authorize it to issue negotiable bonds, holding that in order to issue negotiable bonds express power must be conferred, and that it cannot be implied.

It may be stated as the settled doctrine of the Federal courts, when they are free to follow their own inclination, that even when a municipal corporation has express authority to aid a railroad, as by taking stock or otherwise, and the enabling act does not in express words authorize the municipality to issue its negotiable bonds, that it cannot issue its bonds, and if it does the bonds are invalid, and that the power to issue such bonds will not be implied.¹

266. **Further effect when power is express.**—Power to aid is not exhausted by one subscription, if the sub-

¹ *Brenham v. Ger. Am. Bk.*, 144 U. S. 173; *Hill v. Memphis*, 134 U. S. 198, 203.

scription made is not for the maximum amount fixed in the act, unless the statute indicates a contrary intent.¹

Power to aid a railroad includes power to subscribe for stock and issue bonds, or to donate bonds, as the enabling act may provide, for any material part of the road, as depots and side tracks of an existing road,² or machine shops necessary for its maintenance.³

The constitutional prohibition against taking private property for public use, etc., does not operate to prohibit municipal aid to railroads or other similar public objects,⁴ nor the prohibitions against depriving a person of his property without due process of law, nor does the provision that taxation shall be uniform render a statute giving such aid unconstitutional.⁵

The authority to aid a railroad company by subscribing for its stock does not empower it to endorse the bonds of the company, and such endorsement is void.⁶

In order that a municipal corporation may endorse or guarantee paper or become surety it must have express statutory power so to do.⁷

§ 267. **Railroad a public purpose.**—It is now firmly settled that a railroad is a public improvement or object in the sense that it may be legally aided by a municipal corporation or by the State itself, unless the constitution of the State contains an inhibition against such aid. This has been so decided in all the state courts,⁸ except those of Michigan. In Iowa the courts have ruled both ways. In the former State the courts⁹ have persistently refused to adopt the doctrine, although the Supreme Court of the United States¹⁰ has set aside these State decisions when a case has been properly brought before

¹ *People v. Waynesville*, 88 Ill. 469.

² *Township of Rock Creek v. Strong*, 96 U. S. 271.

³ *Jarrott v. City of Moberly*, 5 Reporter, 583.

⁴ *Queenbury v. Culver*, 19 Wall. 94.

⁵ *Shelbyville R. R. Co. v. Mayor*, 59 Am. Dec. 782.

⁶ *Blake v. Macon*, 53 Ga. 172.

⁷ Dill. on Mun. Corp. (4th ed.)

471.

⁸ *Township of Pine Grove v. Talcott*, 19 Wall. 666; *Commrs. of Leavenworth v. Miller*, 7 Kans. 479.

⁹ *People v. Salem*, 20 Mich. 425;

¹⁰ *Pine Grove Tp. v. Talcott*, 19

them upon which they could act and were not bound by the decisions of the Michigan courts.

In Iowa the question was decided in a number of cases adversely to the proposition that such aid could be rendered,¹ but afterwards this ruling was set aside and the courts have since decided in favor of such aid.²

These roads are held to be public to the extent that they may be assisted by a municipal corporation, because as said by Chief Justice Black, in *Sharpless v. Mayor*, etc., of Philadelphia:³ "The public has an interest in such a road when it belongs to a corporation as clearly as they would have if it were free, or as if tolls were payable to the State, because travel and transportation are cheapened by it to a degree far exceeding all the tolls and charges of every kind, and this advantage the public has, over and above those of rapidity, comfort, convenience, increase of trade, opening of markets, and other means of awarding labor and promoting wealth."⁴

While a railroad is held to be such a public purpose that a municipality may be permitted to aid it; yet a municipal corporation cannot be compelled to render such aid, and a statute attempting to enforce such aid is unconstitutional.⁵ All authority to aid railroads must be

¹ *Stokes v. Scott Co.*, 10 Iowa, 666; *McClure v. Owen*, 26 Iowa, 243.

² *Steward v. Polk Co.*, 30 Iowa, 9; *Renwick v. Davenport*, 47 Iowa, 511.

³ 21 Pa. St. 169.

⁴ On this subject see *Public Purpose* herein, also *Bloomfield Gas L. Co. v. Richardson*, 63 Barb. N. Y. 437; *Jones on R. R. Securities*, § 228.

⁵ *The People v. Batchellor*, 53 N. Y. 128; *State ex rel. Dickinson v. Neely*, 30 S. C. 587.

The courts of Illinois have held that the Legislature could not compel a municipal corporation, a town, to issue its bonds in aid of a railroad, and that where a sub-

scription to a railroad was made pursuant to an unauthorized vote of the people, a subsequent valid curative act could not be passed legalizing the subscription, and directing the supervisors and clerk to issue bonds, because by the act the town would be compelled to aid the railroad without its consent. The court held that an act authorizing the legislative body of a municipal corporation, in such a case, to issue the bonds would have been valid.

That an act in such a case to be valid must leave it to the discretion of the municipal authorities to decide whether they will issue bonds and not compel them to do it. *Marshall v. Silliman*, 61 Ill. 218.

permissive in character, and the question whether such aid will be rendered must be left to the decision of either the inhabitants of the municipal corporation or its officers.

§ 268. **Power, where found—What conditions may be imposed.**—The power to assist railroads is to be found in either the charter of the municipality or in some general or special act of the Legislature or in the charter of the railroad itself. Somewhere it must exist as before shown.

The act usually designates the officers who are to issue the bonds, and these officers may be persons who are not officers of the municipality or chosen by it.¹

The statute may, and usually does, provide that before the aid be granted, that certain conditions on the part of the road to be assisted be performed.

It sometimes provides as a prior condition, that the question of granting the aid be submitted to a vote of the people, and only upon its receiving a designated proportion of the votes cast the officers may act. Sometimes it requires that a certain number of the taxpayers petition to the legislative body of the municipality requesting that it give such aid, or a like petition is presented to a county judge or other designated official before the aid can be extended. The Legislature may impose such conditions and surround the aid with such safeguards as it may deem best for the protection of the people. When the constitution imposes a certain condition there can be no reason why the Legislature cannot impose additional ones, provided the latter do not conflict with the former.

§ 269. **Road to be aided.**—Usually the road to be assisted is designated by name in the enabling act, and it usually passes through the municipality granting the aid, or very near to it.

It is held, however, that the road to be aided need not be within the State in which the municipality granting the aid is located, provided, of course, the enabling act is broad enough in such a case to permit of the issue of the bonds.²

¹ *Sheboygan Co. v. Parker*, 3 Wall. 93. ² *Railroad Co. v. Oteo Co.*, 16 Wall. 667; *Quincy M. & P. R. R.*

Power to aid a particular branch or division of a road will not authorize aid to the whole road.¹

It was held that under the general railroad law of Missouri, the order submitting the proposition to aid a railroad need not specify the name of the corporation, where the proposition described the proposed route of the proposed road with the requisite certainty.²

The proposition to issue aid to one or the other of two roads is void because uncertain. The road to be aided must be designated with certainty.³

Where the road voted to be aided was the "Del Norte Summit Wagon Road Co.," and the bonds were issued to "The Del Norte and Wagon Toll Road Co.," the bonds were held to be valid.⁴

Where a road passed through a county on the north side of a river and the charter of the road authorized that counties on the north side, through which the road passed, could issue its bonds, and a county on the south side of the river issued its bonds to aid the road, it was held that the bonds were void in the hands of a *bona fide* holder.⁵ It has been held that the road to be aided need not be named in the notice of election.⁶ Is it sufficient to designate the route?⁷

§ 270. **What aid may be given.**—Where a statute authorized a county to issue bonds to assist in the construction of any railroad passing through the county, such aid, however, not to exceed five per centum of the assessed value of the property of the county, it was held

Co. v. Morris, 84 Ill. 411; Walker v. Cincinnati, 21 Ohio St. 11; Bell v. Mobile R. Co., 4 Wall. 598; St. Joseph R. Co. v. Buchanan Co., 39 Mo. 485; *contra*, State v. Dallas Co., 72 Mo. 329.

county commissioners the power to determine which of two companies shall be aided. Spurek v. Lincoln etc. R. Co., 11 Neb. 293. Hoog v. Rio Grande Co. Commrs., 31 Fed. Rep. 778.

¹ Town of Big Grove v. Wells, 65 Ill. 263.

² State v. Saline Co., 51 Mo. 350.

³ Ninth Nat. Bk. v. Knox, 37 Fed. Rep. 75; Cours. Johnson Co. v. Thayer, 94 U. S. 631; County of Calloway v. Foster, 93 U. S. 567.

⁴ Marshall v. Silliman, 61 Ill. 218;

contra, State v. Roggen, 22 Neb. 118; McMahon v. San Mateo Co., 46 Cal. 211.

⁵ Knox Co. v. Ninth Nat. Bk., 117

⁶ State v. Roggen, 22 Neb. 118. U. S. 91; Commissioners v. Thayer, 94 U. S. 631.

The people cannot delegate to

that bonds to the extent of five per centum may be issued to each road traversing the county, when so ordered by a vote of the people.¹

Under a statute providing that any county may subscribe to the stock of any railroad in the State and issue its bonds, the subscription not to exceed one hundred thousand dollars, it was held the county may subscribe for that sum to two or more roads;² and where a county may subscribe a certain sum, and it subscribes a less sum, it may afterwards make a second subscription if both taken together do not exceed the limit.³ Where the municipal corporation has authority to aid a railroad under two different acts, it is held it may aid it under each.⁴

The corporate existence of a railroad company in a suit to enforce municipal bonds issued to it, or in aid of it, cannot be called in question, if it in fact was a corporation *de facto* and not *de jure* when the bonds were issued.⁵ Nor can the fact that it was illegally organized, or not organized within the time required by the charter, be set up as a defence to the bonds.⁶ In order to work a forfeiture of such a charter, process on behalf of the State must be taken against the company itself.⁷ The *bona fide* purchaser of bonds need not ascertain for himself that the railroad company is properly incorporated, or was so incorporated at the time of the issue of the bonds to aid it.⁸

Where a city was authorized to donate lands for right of way and other privileges to a railroad, it was held that the city might donate the bonds voted to procure the lands, instead of using them to purchase the right of way. And the bonds were held valid.⁹

¹ Coler v. Board of Commrs. Sante Fe Co., 27 Pac. R. 619.

² Chicot Co. v. Lewis, 103 U. S. 165.

³ Empire v. Darlington, 101 U. S. 87; Barner v. Baylers, 34 N. E. Rep. 502.

⁴ City of Cairo v. Zane, 149 U. S. 122.

⁵ Comrs. of Douglass Co. v. Bolles, 94 U. S. 104; County of Leaven-

worth v. Barnes, 95 U. S. 70, 73.

⁶ Olecott v. Bynum, 17 Wall. 44;

Smith v. Co. of Clark, 54 Mo. 58.

⁷ Kayser v. Trustees of Bremen, 16 Mo. 88.

⁸ County of Macon v. Shores, 97 U. S. 272; Ralls Co. v. Douglass, 105 U. S. 758.

⁹ Converse v. Ft. Scott, 92 U. S. 503.

A statute authorizing a municipal corporation to donate its bonds to aid a railroad is valid.¹

§ 271. **Conditions.**—As before stated the enabling statute, or some general law, or the charter of the municipality or of the company, or the constitution of the State may surround the aid to be given to railroad companies with such conditions and limitations as may seem best to protect the interest of the inhabitants of the municipality granting the aid, or the proposition submitted to the voters and accepted by them may contain such conditions.

When the conditions are imposed by the constitution they must be strictly followed, and any material deviation will be fatal, not only as between the immediate parties, but also as to *bona fide* holders of the bonds.²

If neither the constitution nor statute contain conditions, the proposition may be submitted with any conditions the body submitting it may deem proper.³

The conditions are usually that the proposition to aid the railroad be submitted to and accepted by the voters before the municipal officers can make the subscription and issue the bonds. Often the time within which the road must be completed is made a condition. Again, the completion of the road, the location of the road, or that its termini be established at certain points, are made prior conditions.

The power to determine when the conditions are performed, and to then deliver the bonds, is an official trust and cannot be delegated to strangers, but must be performed by the officers named in the enabling act. As said in *Jackson v. Brush* :⁴ "The reasons for these propositions are obvious. In the first place, the people never assented that any one other than the proper officers of the county should judge of the performance of the

¹ *Oteo Co. v. Baldwin*, 111 U. S. Minn. 224; Dill. on Mun. Corp. 1; *Railroad Co. v. County of Oteo*, (4th ed.) § 531.
16 Wall. 667.

² *People v. Dutcher*, 56 Ill. 141; *Veeder v. Lima*, 19 Wis. 280.

³ 77 Ill. 59; *Mechem on Pub. Officers*, § 567.

⁴ *Harrington v. Plainview*, 27

ditions precedent on which the subscriptions had been voted; and, in the second place, should a controversy arise, it is all-important that the bonds should be in the hands of these officers until the matter should be finally adjudicated. . . . Functions to be exercised by county officials cannot, without special authority given by law, be delegated to strangers with power to act in their stead."

Where the act does not designate any person or tribunal to determine whether the conditions have been performed, the body authorized to issue the bonds must necessarily determine the question.¹

And where the facts, upon the existence of which bonds are to be issued, are exclusively or peculiarly within the knowledge of the city council which is authorized to issue the bonds, it will be inferred that the lawmakers intended to make such council the judge whether such conditions had been fulfilled.²

It is proposed to treat each of these conditions separately.

The submission of the question, the notice of election, the election itself, and the vote, are treated of elsewhere herein. The others now follow.

§ 272. **Time of completion** is often a prior condition, made so by the statute authorizing the subscription to the stock and the issue of the bonds, or by the proposition submitted to the voters, and when it is a condition that the road must be completed by a certain time, such a condition between the parties will be strictly enforced;³ and if not completed within the time, the delivery of the bonds may be restrained, and cannot be enforced, and need not be delivered.⁴

When the statute makes it a condition precedent that

¹ Knox Co. v. Nichols, 14 Ohio St. 260.

² Mutual Ben. L. Ins. Co. v. Elizabeth, 42 N. J. L. 235.

³ Portland & Oxford Cent. R. R. Co. v. Hartford, 58 Me. 23; Talconer v. Buffalo & J. R. R. Co., 69 N. Y. 491.

⁴ Cooper v. Sullivan Co., 65 Mo. 512; McManus v. Duluth, C. & N. R. Co., 51 Minn. 30; 52 N. W. R. 980.

This latter case discusses the point at considerable length.

the road be completed within a certain time, it is strictly enforced, and whether the time at which the road is to be completed is of the essence of the contract is a question to be determined by the rules applied to other contracts.¹

Where the language of the enabling act does not require the completion to be treated as a condition precedent, time will not be considered as the essence of the contract, and the court will compel the issue of the bonds.²

Where a subscription was made on condition that no bonds should be issued unless the company should, within a specified time, locate its machine shops at a certain place, and it having failed to do so, it was held that there was no authority to make the subscription and issue the bonds, and that a tax levied to pay the interest on the bonds could not be collected.³

In the case of *German Savings Bank v. Franklin Co.*, 128 U. S. 526, where the bonds in suit were issued pursuant to an enabling act, the condition imposed being that the road should be completed by June 1st, 1872, they were held void because the road was not completed until November 1st, 1879, and no change was made in the condition. In this case, however, attention is called to the fact that the bonds contained no recitals of the enabling act. Where the bonds recited that they were issued under authority of an act, reciting its title, it was held that such recital estopped the municipal corporation issuing them, from showing, as a defence in a suit brought by a *bona fide* holder, that the road was not completed within the stipulated time.⁴

A condition in the vote that the aid shall not be extended unless the road shall be completed, ready for use, within a specified time, is complied with when the road is built so as to be in as reasonably fit condition, and as

¹ *Kansas City R. R. v. Aldermen*, 121 Mass. 460; *Kansas* 47 Mo. 349; *McManus v. Duluth, C. & N. R. R. Co.*, 52 N. W. R. 580.

² *Onstott v. People*, 123 Ill. 489.

³ *Nevada Bank v. Steinmiltz*, 61 Cal. 301; *Sup. of Portago v. Wis.* 74.

⁴ *Oregon v. Jennings*, 119 U. S.

safe and convenient for the public use, as new roads usually are in similar localities.¹

If the bonds are delivered before the road is finished, and it is not completed within the stipulated time, it is the duty of the railroad company to return the bonds, and if it refuse, a taxpayer may compel it to return the bonds to the municipal corporation to be cancelled.²

When time is the essence of the contract, no excuse upon the part of the corporation to be aided will avail if the road is not completed within the designated time.³

When the municipal corporation receives the stock of a railroad company and retains it, it cannot set up as a defence against the bonds that the road was not completed within the time limited.⁴ When the vote, as recorded, does not stipulate as to when the railroad shall be completed, a railroad company, acting in good faith on such record, may complete the same within a reasonable time, and the records cannot be changed by the clerk so as to contain a time, although such time was expressed in the vote.⁵ When the Legislature extends the time for the completion of the road, the municipality will not be released from its liability for stock subscribed for or bonds to be donated when the contract was completed and the aid delayed until the road was finished.⁶

§ 273. **Completion of the road.**—Another condition may be that before the municipality can subscribe for the stock and issue its bonds, or donate bonds that the road should be completed, and unless the road is completed, ready for service, the issue of the bonds, if made before such completion, will be restrained, and if issued are not valid in the hands of the railroad company or any other person with notice. And it was held not sufficient that the cars were running, transporting freight and

¹ *Manchester & K. R. R. v. Keene*, 62 N. H. 81.

² *Clarke v. Town of Rosedale*, 12 So. R. (Miss.) 600.

³ *McManus v. Duluth, C. & N. R. R. Co.*, 52 N. W. R. 980; see 30 Am. & Eng. Corp. R. Cases. 262; 22 Ib. 130.

⁴ *Lancaster v. Cheraw R. Co.*, 28 S. C. 134.

⁵ *Sawyer v. Manchester etc. R. Co.*, 62 N. H. 135.

⁶ *Jaks v. Helena*, 41 Ark. 213; *Com. v. Pittsburgh*, 41 Pa. St. 271.

passengers, if the road was not completed.¹ And where the road was to be completed before the bonds were to issue, and they were placed in the hands of a third party to hold and be delivered when the road was located and constructed through the town, and before its completion a constitutional amendment was adopted which prohibited aid to railroads, it was held that the holder could not compel the delivery of the bonds,² because the commissioners, until the road was completed, could not subscribe for the stock or issue the bonds, and the constitutional amendment prohibited both when the road was completed. In another case, where, under a general statute, towns were authorized to make appropriations or donations to railroads when their tracks should be located and constructed through the town, a town in 1869 voted to make an appropriation for that purpose if the railroad would run its tracks through the town. The company assented to and accepted the proposed assistance. Afterwards a new constitution was adopted by the State (Illinois) which prohibited such aid, but the town, after the adoption of the constitution, issued its bonds.

The United States Supreme Court held the bonds to be invalid in the hands of a *bona fide* holder, because the company was not to be aided until the road was completed, and before it was completed the constitution prohibited such aid.

There was no vested right in the road to the aid, and the obligation of the contract was not impaired.

It is not essential to compliance with a condition of completion of the road that a new line should be built, the purchase and adoption as a part of its road of a line already constructed along the proposed route is sufficient;³ but a loan of another road, adopted as a part of the line, terminable at will, is not sufficient.⁴

It may be stipulated that, as the road is built, bonds may be issued at a specified rate per mile of com-

¹ Railroad Co. v. Hartford, 58 Me. 23.

² Falconer v. Buffalo R. R. Co., 69 N. Y. 291.

³ Stockton & V. R. R. Co. v. Stockton, 51 Cal. 528.

⁴ People v. Clayton, 88 Ill. 45.

pleted track, and in such a case the bonds, if issued by a board or officers qualified to so issue them, are valid.¹

§ 274. **Location of road and termini.**—The location of the road is very frequently made a prior condition, and between the parties it is generally strictly enforced, and, unless complied with, *mandamus* will not issue to compel the delivery of the bonds. And where it is a condition precedent that the railroad should be constructed over a certain route, or establish its termini at certain points, such conditions will be strictly construed, and upon a failure to perform them, the issue of the bonds may be enjoined by any taxpayer, or if issued may still, in the hands of the company or any other holder, with knowledge, be decreed to be surrendered up for cancellation.²

Where a railroad company represented as an inducement that it would locate its depot on a certain section, and after the voters had voted that the bonds should issue, the depot was located on another section, the court restrained the issue of the bonds.³

It has been held that constructing the road within two thousand feet of a mill, when the condition was that it should be constructed within twelve hundred feet of it, did not fulfil the condition, and *mandamus* to compel the issue of the bonds was refused.⁴ It may be stated generally that when the conditions have not been substantially complied with the issue of the bonds will be restrained.

As to what is a substantial compliance is often a difficult question to decide. It has been held in the United States Supreme Court that when the location at a particular place is a condition precedent, practical compliance

¹ Nevada Bank v. Steinmütz, 30 Pac. Rep. 970. 587; Purdy v. Lansing, 128 U. S. 557.

² Portage Co. v. Wisconsin R. R. Co., 121 Mass. 460; Portland R. R. Co. v. Hartford, 58 Me. 23; State v. Morristown, (Tenn.) 24 S. W. R. 6 Nev. 68; Aurora v. West, 22 Ind. 13; People v. Morgan, 55 N. Y. 88.

³ Wullenwahr v. Dunnigan, (Neb.) 47 N. W. R. 420.

⁴ Virginia etc. R. Co. v. Lyon Co., 6 Nev. 68; Aurora v. West, 22 Ind. 13.

with the terms is sufficient, and the building of the road a fraction of a mile away is immaterial.¹

A condition precedent that the railroad company should, before a certain day, have completed, ironed and equipped its line of road from a village to a certain city, and have the same in operation for carrying freight and passengers, is substantially complied with by constructing the road within a quarter of a mile of the village, and from that point entering the town on the tracks of another road and using its depot.²

Where the county was not authorized by name to subscribe, but the charter of the company authorized counties, through, near, into, or from which, the railroad would run, to subscribe, it has been held that the road need not be located at the time of the subscription, and that the proposition submitted to the voters need not describe the road,³ but in another case it was held that there must be a sufficient location to identify the counties authorized to subscribe. And where the company fixed the eastern point but no western terminus nor any definite route, this was held an insufficient location to authorize the issue of the bonds.⁴ In another case, it was held that where the company fixed both termini, it might select the most advantageous route, and that counties not in direct line between the termini, and not directly on the line of the road, were authorized to subscribe, if they would be benefited by the road.⁵ And in another case, under similar authority, it was held that the road must be located before the county could subscribe.⁶

When the termini is to be established at certain points, it must be so located before *mandamus* will issue compelling the bonds to be delivered.⁷

Where the condition in a vote was that the railroad

¹ Johnson Co. v. Thayer, 91 U. S. 631.

² Schuyler v. Thomas, 98 U. S. 169.

³ State v. Clark, 23 Minn. 422.

⁴ People v. Morgan, 55 N. Y. 587.

⁵ Comrs. of Johnson Co. v. Thayer, 94 U. S. 631.

⁶ State v. Minneapolis, 32 Minn. 501; Purdy v. Lansing, 128 U. S. 557; People v. Morgan, 55 N. Y. 587.

⁷ Melin v. Lansing, 19 Blatchf. 512.

company should establish and maintain a division terminus at a point situated between two cities, it was held the condition was fulfilled where the terminus was established at a point on the road between the two cities a few rods from the direct line between them.¹

Where the vote stipulated that the road should be built between certain cities, and the bonds were to issue at a certain amount per mile, and the road was not built the entire distance between the termini, the court by a divided vote, held the bonds to be valid.²

Where the condition was that, before the warrants should issue, the company should have built and put in operation its railroad, with cars running thereon, by lease or otherwise, said road to be built from the city A., at or near the depot of another road, to another city M., the road was built from M. to within 111 feet of the limits of A., at which point it intersected the roads of the old company and from there ran its cars over the old road to its depot.

The court held this to be a substantial compliance with the conditions.³

Where the act under which the bonds were issued required that the road be located before the election was held to vote on the proposition to aid the road, but the election was held prior to the location, the court held, in a suit brought by an innocent holder on the bonds, that the defence could not be interposed, that the people who should have known of the necessity for the prior location voted to issue the bonds before the road was located and afterwards took no steps to prevent the issue of the bonds, but on the contrary acquiesced in the exchange of the bonds for stock. It was too late to set up the irregularity against a *bona fide* holder.⁴

§ 275. **Waiver of conditions.**—As between the mu-

¹ Chicago etc. R. R. Co. v. Harris, 30 P. R. 456.

² Nevada Bank v. Steinnitz, 64 Cal. 301.

³ Chicago & R. R. Co. v. Makepeace, 24 P. R. 1104. See 30 Am. &

Eng. R. Cases, 245, n. for what will be considered a compliance as to termini.

⁴ State v. Van Horne, 7 Ohio St. 331.

municipality and the company to be aided, when the prior conditions are imposed by a vote of the people, the conditions cannot be waived.

As where the condition was that the road should be completed within a certain time, if not so completed the condition cannot be waived, and the issue of the bonds will be restrained.¹

Where the proposition to aid a railroad indicated the route of the proposed road and the proposition was accepted, it was held that the modifications of the location by the officers of the municipality were void, and that the issue of the bonds pursuant to the proposition, as modified, would be restrained.²

And where the bonds were issued upon the vote of the people on condition that the road should be completed before a certain time, and this was not done, and the bonds were issued nevertheless, it was held the bonds were void.³

And where a railroad petitioned for aid and stipulated that the road would be completed by a certain time, and the electors to whom the matter was submitted voted to give such aid, and the road not being completed within the time, the council extended the time, it was held that such extension was illegal, that the council had no power to vary the contract as authorized by the vote of the citizens.⁴

The reason the municipal officers cannot waive conditions imposed by a vote of the people under statutes which authorize such conditions to be imposed by them is that the conditions were not imposed by the authority of the municipal officers.⁵

§ 276. **When the conditions may be waived.**—There are a few cases which are to the effect that the conditions may be waived, and in one case,³ where the time of com-

¹ *Hodgman v. Chicago & S. R.*, 20 Minn. 48.

⁴ *Clark v. Town of Rosedale*, (Miss.) 12 So. R. 600.

² *State v. City of Morristown*, 24 S. W. R. 13; *Plattville v. Galena*, 493; *Hodgman v. Chicago R. R.*, 43 Wis. 493; *contra*, *Coleman v. Supervisors*, 50 Cal. 493.

⁵ *Platteville etc. v. Galena*, 43 Wis.

³ *Eddy v. People*, 127 Ill. 428.

⁶ *County of Randolph v. Post*, 92 U. S. 502, 513.

pletion was extended by the county court, the court, in sustaining the bonds, said :

" We should unreasonably restrict the rights and powers of a municipal corporation were we to hold that it did not possess the power to alter its legally made contract by waiving conditions found to be injurious to its interests, or that it could not estop itself like other parties to a contract."¹

It must be stated as the general rule of the state courts that the conditions cannot be waived when they are imposed by a vote of the people.² And it is held that the people themselves, without authority so to do, cannot at a subsequent election waive the former conditions,³ although in another case it was held the second vote was valid unless prohibited.⁴

The Legislature may authorize a waiver after the vote is taken or the subscription made, unless restrained by some provision of the State constitution.⁵

When the authority is granted to the legislative body of a municipal corporation to aid a railroad without submitting the question for approval to the voters, and certain prior conditions are imposed upon the railroad company by the municipal corporation before aid is to be given, it seems to the writer that such conditions could be waived, because the same power which imposed the conditions would naturally have authority to waive or change them.⁶

And where the vote of the people merely authorizes the municipal officers to aid the company, but imposes no

¹ See, also, *Commonwealth v. Pittsburgh*, 43 Pa. St. 391; *Montrie v. Rockingham*, 92 U. S. 631.

² *Town of Platteville v. Galena*, 43 Wis. 493; *Hodgman v. Chicago R. R. Co.*, 20 Minn. 48.

³ *Illinois M. R. R. Co. v. Waynesville*, 6 Rep. 457.

Where a county court was authorized to submit to the voters a proposition to aid a railroad with such conditions as the court deemed proper, and it did so, and the prop-

osition was carried, it was held the court could not re-submit the proposition with different conditions. *Madison Co. Court v. Richmond, L. & F. F. R. R. Co.*, 80 Ky. 16.

⁴ *Supervisors v. Gilbraith*, 99 U. S. 214.

⁵ *Comrs. v. Pittsburgh*, 41 Pa. St. 278.

⁶ *Grand Chute v. Winegar*, 15 Wall. 373; *Randolph v. Post*, 93 U. S. 502.

conditions, if the municipal officers do so, they should be held to have the power to waive them.¹

If matters are submitted which the law does not require, these may be waived.²

There is one condition, it would seem, that cannot be waived, which is that the railroad shall build its road through the town subscribing the stock.³

§ 277. **Subscription.**—After an affirmative vote has been had, the prior consent of the voters being necessary before the subscription can be made for stock, the effect of such vote is simply to empower the proper officers to make a subscription. Such authority is only executory, and may be repealed or limited.⁴ And, if before the subscription is made, or can legally be made, the State adopt a constitution which prohibits municipalities from giving such aid, then the bonds cannot be issued, or if issued, are void.⁵

In *Falconer v. Buffalo etc. R. R. Co.*,⁶ where, by the terms of the vote, it was made a condition precedent that the route must be first adopted and the track on the road laid, before the bonds could be delivered, and before the conditions imposed by the vote were fulfilled, the amended constitution of New York, of 1874, was adopted, which prohibited municipalities to subscribe for stock of a railroad company, or to aid or assist one, the court held that this provision prohibited the issue of the bonds; that no right to have or issue the bonds was created until the conditions were performed, and until that time the contract was incomplete; and as the constitution went into effect before the conditions were fulfilled the aid could not be extended.

¹ *St. Joseph & Co. v. Buchanan* N. Y. 491; *Bates Co. v. Winters*, Co., 39 Mo. 485. 97 U. S. 83; *Union P. R. R. Co. v.*

² *Yesler v. City of Seattle*, 1 Wash. Davis Co. Comrs., 6 Kan. 256; 308; *People v. Cass Co.*, 77 Ill. 438. *Bound v. Wisconsin R. R. Co.*, 45

³ *Concord v. Portsmouth Sav. Bk.*, Wis. 543; *Aspinwall v. Comrs.*, 22 92 U. S. 625; *Barthol v. Meader*, How. 361.

⁴ *Concord v. Portsmouth Sav. Bk.*, 92 U. S. 625. 72 Iowa, 125; *Burgess v. Mobin*, 70 Ib. 630; *Treadwell v. Comrs.*, 11

⁵ *Concord v. Portsmouth Sav. Bk.*, 92 U. S. 625. Ohio, 183. See, however, *Van Hosten v. Madison City*, 1 Wall. 291. ⁶ 69 N. Y. 491. See, also, *Jeffries v. Lawrence*, 42 Iowa, 498.

⁴ *Falconer v. B. J. R. R. Co.*, 69

The constitution of Illinois, which became operative July 2, 1870, prohibited any city, town, township or other municipality to subscribe to the capital stock of, or to make a donation to, a railroad: "Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such *subscriptions*, where the same have been authorized under existing laws, by a vote of the people of such municipality prior to such adoption." The Supreme Court of the United States,¹ held that the exception only applied to subscriptions voted for at a prior election, but did not include a donation, although voted for and accepted by the railroad company before the constitution went into effect, and that the constitutional prohibition annulled the right to make such donation.

The court,² however, has since reversed its opinion because the Supreme Court of Illinois had, prior to the date of the former decision, held a donation to be included in the exception, and held such a donation to be good. And in doing so, said in part: "But we were not informed, when the case was decided, that any judicial construction had been given to the constitutional provision. It now appears that the Supreme Court of Illinois had previously considered it, and decided that donations, equally with subscriptions, if sanctioned with a popular vote before the adoption of the constitution, are not prohibited by it, and that they are excepted from the prohibition by the proviso. . . . In such a case we think it our duty to follow the state courts, and adopt as the true construction that which those courts have declared."

¹ *Concord v. Portsmouth*, 92 U. S. 625. the constitution of Illinois of 1870, which forbade the issue of such

² *Fairfield v. Gallatin Co.*, 100 U. S. 47. See, also, *Chicago etc. R. R. Co. v. Pinkney*, 74 Ill. 277. bonds unless "authorized under existing laws by vote of the people prior to such adoption," and which

The election to be within the saving clause of the constitution must be a valid election. *Lippencott v. Pana*, 92 Ill. 24. bonds recited that they were duly authorized by a majority of the voters at an election held prior to the adoption of the constitution,

In the case of *Hutchinson v. Self*, 153 Ill. 542, where the bonds in suit were issued after the adoption of the constitution, the court held that the burden to show the illegality of the bonds was cast on the property-holder.

If the constitutional prohibition is directed to the Legislature, it then only acts as a limit upon future legislation and does not repeal or operate upon existing enabling acts. If the subscription is made, and bonds issued, after the adoption of such a constitutional prohibition, either as a donation or in payment of the stock, the subscription and bonds are valid.¹

The Supreme Court of Missouri, after announcing and following the above doctrine in several cases,² afterwards adopted a contrary ruling,³ which latter ruling the Supreme Court of the United States, having followed the former ruling, refused to follow, because it would prejudice *bona fide* holders of bonds issued by municipal corporations in Missouri before it reversed its former rulings.⁴

If the inhibition directed to the municipalities does not entirely prohibit the aid, but contains certain conditions, then the subscription cannot be made under the old laws, but these must be changed so as to conform with the terms of the inhibition, as where the new constitution required that the stock should be paid for when subscribed, it was held that it forbade a municipal corporation to subscribe for stock without paying for it at the time, although it had that power under a former enabling statute.⁵

¹ Fosdick v. Perrysburg, 14 Ohio St. 472; Scotland Co. v. Hill, 132 U. S. 107; Ralls Co. v. Douglass, 105 U. S. 128; Cass Co. v. Gillett, 100 U. S. 585; Red Rock v. Henry, 106 U. S. 596; People v. Hamil, 134 Ill. 666; Donation Fairfield v. Gallatin Co., 100 U. S. 47; Lippen-cott v. Pana, 92 Ill. 21; Knox Co. v. Ninth Nat. Bk., 147 U. S. 91.

² State v. Macon Co. Ct., 41 Mo. 453; State v. Sullivan Co., 51 Mo. 527.

³ State v. Gavionette, 67 Mo. 455; State v. Dallas Co. Ct., 72 Mo. 329.

⁴ Ralls Co. v. Douglass, 105 U. S. 128; Scotland Co. v. Hill, 132 U. S. 107.

⁵ Aspinwall v. Com'rs 22 How.

361; Norton v. Brownsville, 129 U. S. 490. In the latter case, Brownsville under an act of Feb. 8, 1870, was authorized to issue bonds in aid of a railroad company on a majority vote. Before such vote held was the amended constitution took effect, which prohibited such aid, unless "with the assent of three-fourths of the votes at said election." Five days after the constitution went into effect, proceedings to hold an election under the statute were instituted, and afterwards an election was held under the statute at which all the votes were cast in favor of issuing the bonds to aid the road.

The charter of a railroad company authorizing a municipal subscription is deemed to be a contract between the State and the company, and it is held that this provision in the charter is not affected by a constitutional amendment which prohibits counties, cities and towns from granting such aid, and that a subscription authorized by such a charter may be made after the adoption of such a constitutional provision, and that the bonds issued in pursuance of it will be valid.¹

But when the power is given under a general law and not contained in the charter of the company, the power to subscribe may be curtailed or repealed, if done before the subscription is made.²

After the subscription has been made it cannot be impaired any more than any other contract,³ and as the subscription is valid, so are the bonds.⁴ After the subscription has been made a contract exists, and the bonds may be compelled to be issued,⁵ and the creditors of the company may enforce it.⁶

The municipal authorities may, before the rights of others have become vested, rescind by a subsequent ordinance or resolution, a former ordinance or resolution relating to the issue of bonds or the making of a contract, provided the enabling statute does not prevent such rescission; but after the rights of others have accrued, there can be no rescission.⁷

§ 278. **When subscription is complete.**—The subscription is regarded as completed after the officers have subscribed for the stock on the books of the company, although

The court held the power to issue the bonds under the statute, not having been acted upon until after the adoption of the amended constitution, could not be exercised, and that as it was in conflict with the constitution it must be reformed to comply with the present constitution.

¹ Jones, R. R. Securities, § 274.

² Town of Concord v. Portsmouth Sav. Bk., 92 U. S. 625; Dill, on Mun. Corp. (4th ed.) §§ 70, 539.

³ Town of Cherry Creek v. Becker *et al.*, 123 N. Y. 161.

⁴ Montrie Co. v. Rockingham Sav. Bk., 92 U. S. 631.

⁵ People v. Ohio Grove Tp., 51 Ill. 192; Napa Valley R. R. v. Sup. Napa Co., 30 Cal. 435; Chicago etc. R. R. Co. v. Pinckney, 74 Ill. 277.

⁶ Morgan Co. v. Thomas, 76 Ill. 120.

⁷ Town of Cherry Creek v. Becker *et al.*, 123 N. Y. 161; People v. Ohio Grove Tp., 51 Ill. 192.

an actual signing on the books of the company is not essential to create a contract, the obligation of which cannot be impaired.¹

A resolution or an ordinance of the municipal corporation, if properly framed, will act as a subscription when so intended, and upon acceptance will constitute a contract which cannot afterwards be annulled by a constitutional amendment.²

The statute submitting the question to the voters, may, and sometimes does, provide that an affirmative vote of the people, upon a proposition to aid a railway, and issue bonds, shall constitute a subscription, and in that case a contract is made which cannot be impaired.³

Sometimes the enabling statute authorizes the making of a subscription at any time, but delays the issue of the bonds in payment, until some condition be fulfilled, as the completion of the road. When a subscription is made under such a statute it becomes a contract which cannot be impaired, and the bonds, when the condition is fulfilled, must be issued.⁴

The order of a court which recited that the county subscribed for a certain number of shares, if concurred in by the necessary number of judges, or where there is one judge, the order made by him, is a subscription. And in a case where the question arose the court said:

“We cannot, therefore, regard this order as a mere offer or pledge to subscribe the fifty shares in this particular road, but as actually taking, and in substance and legal effect subscribing for, that number of shares.”⁵

When a contract is entered into, or a subscription is

¹ *Nugent v. Putman Co.*, 19 Wall. Philadelphia, 21 Pa. St. 171; *Gunn* 241; *Cass. Co. v. Gillett*, 100 U. S. v. *Barry*, 15 Wall. 623.
585; *Bates Co. v. Winters*, 112 ³ *East Lincoln v. Davenport*, 94 U. S. 325. U. S. 801.

A subscription, conditional upon the subscription of another town cannot be rescinded after the latter has subscribed. *Redd. v. Henry* ⁴ *Livingston Co. v. Portsmouth Bk.*, 128 U. S. 102; *Town of Concord v. Portsmouth Sav. Bk.*, 92 U. S. 625.
Co., 3 Gratt. 695. ⁵ *Clarke Co. Ct. v. Paris & R. Co.*, 11 Ben. Monroe, 143.

² *Town of Concord v. Portsmouth*, 92 U. S. 625; *Western S. F. S. v.*

once made by municipal corporation, it creates a contract protected by the constitution, which may be enforced by *mandamus*.¹

Unless the statute authorizes it, a railroad company cannot agree to favor a municipality holding stock, which it received in return for its aid.²

§ 279. **Consolidations.**—Generally a municipality is not bound to issue bonds to aid a railroad formed by the consolidation of the corporation, to which it has contracted to issue its bonds, and another one,³ but if the corporation to be aided had power to consolidate with another at the time the election was held or subscription made, or the Legislature had the reserve power to authorize a consolidation, the new company formed by the consolidation is entitled to all the rights of the old company, and it may compel the issue of bonds to it, which were voted or subscribed to the old company.⁴

But where the subscription is authorized by a prior vote to be made to a designated company, and there is no legislative authority to consolidate with another company, and the company voted to be aided, does, in fact, consolidate with another, bonds, if issued to the consolidated company, are void.⁵ The reason is that the people voted to assist a designated company, which had no power to consolidate when the vote was taken, and the bonds are issued to assist that company, and also another company not voted for, or authorized to be aided.

An inspection of the law authorizing the issue would disclose that aid was to be extended to one company, while the bonds would disclose that they were issued to aid another.⁶

¹ *Nugent v. Putman*, 19 Wall. 211; *Morgan Co. v. Thomas*, 76 Ill. 120. *Bates v. Winters*, 112 U. S. 325; *Seetland Co. v. Thomas*, 94 U. S. 682; 4 Am. & Eng. R. R. Cases, 326.

² *Pittsburgh S. R. Co. v. Allegheny Co.*, 79 Pa. St. 210. ⁵ *Harshman v. Bates Co.*, 92 U. S. 569; *Township of Midland v. Gage Co.*, 56 N. W. R. (Neb.) 317; *March v. Fulton Co.*, 10 Wall. 676.

³ *Harsham v. Bates Co.*, 92 U. S. 569. ⁶ *State v. Garrouite*, 67 Mo. 445; *Marsh v. Fulton Co.*, 10 Wall. 676.

⁴ *Denison v. Mayor etc. of Columbus*, 62 Fed. Rep. 775; *Livingston v. First Nat. Bk.*, 128 U. S. 122; 390

When a vote has been taken to aid a designated company, and it had authority to consolidate with another company, and it does so before the subscription is made, the subscription may be made to the stock of the consolidated company, and the bonds may be issued for such stock.¹

When the company voted to be aided changes its corporate name, it is still entitled to such assistance.²

The issue of bonds will be restrained from delivery to a consolidated company, when the vote was to issue bonds to aid a designated company, and it had, at the time of voting the aid, no legislative authority to consolidate.³

In one case, but not generally followed, a vote was taken to aid a company, and before the subscription was made, it consolidated with another company under a general law. It was held that the county could not be compelled to subscribe to the consolidated company.⁴

It is held that the old company may consolidate with another, incorporated in another State, and that the aid may legally be given to the new company.⁵

It has been held that before the aid voted to a company can be legally demanded by the consolidated company, that the consolidated company must form a completed, continuous track so that trains may be run without break, over the old company's tracks and that of the company with which it has consolidated.⁶

§ 280. **Difference between subscription and donation.**—The authority to subscribe and issue bonds does not authorize a municipal corporation to donate its bonds. Where a municipal corporation was authorized by pop-

¹ Washburn v. Cass Co., 3 Dill. 251; Livingston Co. v. Portsmouth Bank, 128 U. S. 102; Scotland Co. v. Thomas, 94 U. S. 682.

² Reading v. Wedder, 66 Ill. 80.

³ Township of Midland v. Gage Co., 56 N. W. R. 317; Nash v. Baker, 56 N. W. R. 376.

⁴ Harshman v. Bates, 92 U. S. 569. See Burroughs on Pub. Secur-

ities, p. 457, *et seq.*; Dill, on Mun. Corp. (4th ed.) § 541.

⁵ Livingston Co. v. First Nat. Bk. of Portsmouth, 128 U. S. 102. This case discusses the right of railroads to consolidate, and the rights flowing therefrom.

⁶ Georgia P. R. Co. v. Gaines, 88

ular vote to subscribe for \$100,000 of stock in a railroad company and issue its bonds in payment thereof, and the officers of the municipality agreed to sell the stock back to the company in exchange for \$5,000 of the said bonds, as a matter of fact only \$95,000 of the bonds were issued and delivered to the company, and no stock was received by the municipality. The bonds were held to be invalid, because they were a gift and not a subscription, and the gift was not authorized by the statute or the vote.¹

In another case, where the popular vote authorized the municipal corporation to issue bonds to pay for \$100,000 of stock, and the municipal officers agreed to sell, and did sell, the stock back to the railroad company for \$30,000 of the bonds, it was held that the \$70,000 of the bonds were void, because in effect but a gift.²

In both of the above cases the bonds had not passed into the hands of innocent holders, but were still in the possession of the railroad company.

§ 281. **Such bonds valid in hands of bona fide holder.**—But when such bonds have passed into the hands of innocent holders they are valid.³ A case in point is that of *City of Cairo v. Zane*, 149 U. S. 122, wherein it appears that the city was authorized, by a popular vote, to subscribe for \$100,000 of stock in a railroad company and issue its bonds therefor, and afterwards the city council agreed to sell to the company all the stock for a return of \$5,000 of the city bonds, and after the exchange of the stock and delivery of the whole issue of bonds therefor, the stock was sold to the company for the \$5,000 of bonds.

It was held that the transaction was not a donation of the \$95,000, and if any wrong was done by the council in thus disposing of the stock, it did not vitiate the bonds in the hands of a *bona fide* purchaser.

The bonds in this case recited that they were issued in

¹ *Choisser v. People* (Ill.), 29 N. E. R. 546; *Post v. Pulaski Co.* 49 Fed. Rep. 628.

² *Samson v. People* (Ill.), 30 N. E. R. 689.

³ *Maxey v. Williamson*, 72 Ill. 207.

pursuance of an ordinance passed by the city council, authorized by a vote of the citizens of the city, and in accordance with the laws of the State of Illinois, without referring further to the ordinance or laws.

The act also required that the bonds should be registered in the State auditor's office upon filing of an affidavit that the prior conditions had been performed.

The court held that the fact of the registration and the filing of the affidavit protected the bonds in the hands of a *bona fide* holder, and that if he was bound to look at the records, then the affidavit was conclusive of the facts recited, and the court rested its decision upon these facts, rather than upon the fact that a *bona fide* holder of bonds is not bound by misconduct or fraud of municipal officers, as appeared to be the reason for holding like bonds valid in the case of *Anderson County v. Beal*, 113 U. S. 227, where, after the bonds were voted, the county passed an order directing a subscription in accordance with the terms of the vote, and also provided that "the stock above subscribed for by this board in behalf of Anderson County is hereby sold and transferred for and in consideration of one dollar, the receipt whereof is hereby acknowledged to James F. Joy, president of said railroad company, and the chairman of this board is hereby authorized to sign a transfer of said stock to said James F. Joy," etc.

The defence was that the stock was in fact returned to the railroad, and that the transaction was a donation. The court said, p. 240 :

"When the bonds were delivered to the company the transaction was complete, and the bonds, as they afterwards passed to *bona fide* holders, passed free from any impairment by reason of any dealing of the board with the stock subscribed for, to which the county became entitled by the issue and delivery of the bonds. The board may have committed an improper act in parting with the stock, but that is no concern of a *bona fide* holder of the bonds or coupons."

§ 282. **Difference between exchanging bonds for stock and borrowing.**—There is a marked difference be-

tween the exchange of bonds for stock and the borrowing money on their bonds by municipal corporations and paying for the stock.

In the former case the railroad company may sell the bonds so obtained at any figure, and in the latter the railroad company receives for its stock its par value.

It was held the settled doctrine in New York, before the constitution prohibited aid to railroads, that the bonds could not be exchanged for the stock, but must be sold by the municipal corporation and the stock paid for in cash; and the bonds, if exchanged, were void in the hands of all holders with notice of that fact,¹ although in the other State courts, as well as in the Federal courts, the distinction is not observed.²

The courts of New York so consistently followed its first ruling on this subject, that the United States Supreme Court adopted this ruling when bonds issued under former New York statutes came before it.³

¹ *Starin v. Town of Genoa*, 23 N. Y. 139; *Horton v. Town of Thompson*, 71 Ib. 513.

² *Venice v. Murdock*, 92 U. S. 491; *Commonwealth v. Williamstown*, (Mass.) 30 N. E. R. 472. In *Rogers v. Burlington*, 3 Wall. 654, 667, where the city had authority "to borrow money for any public purpose," and it issued its bonds and delivered them to the railroad company, instead of borrowing money on them and using the money to buy the stock, the court said: "Perfect acquiescence in the action of the officers of the city seem to have been manifested by the defendants until the demand was made for the payment of interest.

"They never attempted to enjoin the proceedings but suffered the bonds to be issued and delivered to the company, and when that was done it was too late to object that the power conferred in the charter had not been properly executed.

³ *Scipio v. Wright*, 101 U. S. 665. Where a statute of New York required that bonds issued to aid a railroad be sold and their proceeds be invested in the stock of the railroad company, and the bonds were issued which recited the enabling act and that they were issued "for value received in the stock of" naming the company, and were delivered directly to the company to be aided, the Court of Appeals of New York held the bonds in the hands of a *bona fide* holder to be invalid, in *People v. Batchellor*, 53 N. Y. 128; but in the later case of *Town of Duanesburgh v. Jenkins*, 57 N. Y. 177, reversed its former decision, and in *Horton v. Town of Thompson*, 71 N. Y. 513, adopted the doctrine laid down in *People v. Batchellor*, *supra*. On the 28th of April, 1871, the Legislature of New York passed an act to legalize bonds issued under said act, but delivered to the railroad

§ 283. **Rights of bona fide holders of Municipal aid bonds.**—As we have heretofore seen, the failure to perform the prior conditions on the part of the railroad company, unless waived, will render the bonds, while in the possession of the company, or that of a holder with notice, void;¹ and if not issued, their issue will not be ordered, and may be restrained on the application of any taxpayer. It remains to be shown what effect the non-performance of such conditions will have upon the bonds after they have passed into the hands of a *bona fide* holder.

It may be stated generally that such bonds, in the hands of a *bona fide* holder, without notice of the non-performance of the conditions, are valid, and against him the fact of non-performance cannot be set up as a defence,² unless the prior condition was one which was required to be performed by the constitution of the State, or the statute expressly declared the bonds should be void, unless the conditions were fulfilled, in which latter cases the bonds will be invalid.³

company instead of being sold, as required by the original act.

The United States Supreme Court in *Thompson v. Perrine*, (1880) 103 U. S. 806, held that such a curative act was valid, and the bonds held by the defendant in error (*Perrine*) which he acquired after the decision in *Town of Duanesburgh v. Jenkins*, and before that of *Horton v. Town of Thompson*, were valid, although the latter case held such curative act to be unconstitutional. The court said:

"If the recitals in the bonds gave notice that the acts of 1868 and 1869 forbade their exchange for stock and required them to be sold and their proceeds invested in such stock, the purchaser is also presumed to have known, not only that such exchange had been legalized by the act of 1871, but that the authority of the Legislature to pass that act was sustained by the

decisions of the highest court of the State, rendered prior to its passage. His rights, therefore, should not be affected by a decision rendered after they accrued, which decision is in conflict with the law as declared not only by this court in numerous cases, but by the highest court of the State, at and before the time he purchased the bonds."

¹ *Mobile Sav. Bk. v. Oetibbecka Co.*, 24 Fed. Rep. 110; *Stockton R. R. Co. v. Stockton*, 51 Cal. 328; *Parker v. Smith*, 3 Ill. App. 356.

² *Randolph v. Post*, 93 U. S. 502; *Chiniquy v. People*, 78 Ill. 570; *Town of Cherry Creek v. Clark*, 123 N. Y. 161; *Jones on R. R. Securities*, § 291; *Dill on Mun. Corp.*, 520; *Burroughs on Pub. Securities*, 357; *A. L. Ins. Co. v. Bruce*, 105 U. S. 328; *Pana v. Bowler*, 107 U. S. 529, 39.

³ *Harrington v. Plainview*, 27 Minn. 224; *Post v. Supervisors*, 105

The bonds, however, in order to protect the innocent holder, when the prior conditions have not been performed, or their performance waived, must contain such recitals; usually that they are issued pursuant to the enabling act, reciting it, that assures the holder that all the prior conditions have been performed, and this recital must be made by the board, body or officers of the municipal corporation who are authorized, expressly or impliedly, to pass upon the question of performance, or by their agents appointed by them.¹ (See the chapter on recitals in another part of this work.²) If the bonds do not contain recitals, or contain improper or insufficient recitals, they will still be valid if the records of the board, or court, or body, or officers authorized to issue the bonds and pass upon the question of performance, show that such board, court, body or officers did in fact pass upon it and determine that the conditions were performed.³

If the performance of the prior conditions have not been determined and their determination evidenced, either in the bonds by the proper recitals, or by the records of the proceedings relative to their issue, the bonds, although in the hands of innocent holders, are open to the defence of the non-performance of prior conditions, and the mere fact of their issue is not conclusive evidence of the performance of prior conditions. In one or two cases in New Jersey, such, however, has been held to be conclusive evidence of the performance of prior conditions.⁴

The courts of New York State have not given to recitals in bonds issued to pay for stock in a railroad company, so far as the determination of the question by the officers authorized to issue the bonds relates to whether the proper consent of the taxpayers has been given is concerned, the conclusiveness such determination is

U. S. 667: *South Ottawa v. Perkins*,
94 U. S. 260. See §§ 253, 254, 255.

² See §§ 193-216.

³ See § 240.

¹ *Denison v. Mayor etc. of City
of Columbus*, 62 Fed. Rep. 775;
City of Columbus v. Denison, 69
Fed. Rep. 58; *Pana v. Bowler*, 107
U. S. 529.

⁴ *Cotton v. New Providence, 47
N. J. L. 401*; *Mut. B. L. Ins. Co. v.
Elizabeth*, 13 Vr. 235. See §§ 224.

given by the Federal and other State courts. In that State such determination, whether found in the recitals of the bond, or the affidavit of the officers, is regarded as *prima facie*, and may be disputed even against a *bona fide* holder.¹

All the acts imposing conditions must be recited in the bonds, and this is illustrated by the case of Citizens' Saving and Loan Association v. Perry County, 156 U. S. 292. The bonds in suit were voted to be issued after the railroad company had located their shops at a certain place. They were never located, but the bonds were issued by the county court.

The court held the bonds to be void in the hands of a *bona fide* holder, because they did not recite they were issued by virtue of the statute under which the condition was imposed, and that, therefore, the county was not estopped from setting up the non-performance of the conditions precedent. This case also refers to other decisions of the court, where the court held the municipality to be estopped from setting up the non-performance of precedent conditions, when the acts under which the bonds were issued were referred to in the bonds.

What would be the effect of the non-performance of some conditions in relation to railroad aid imposed by the constitution, if they were not performed, and the bond in the hands of a *bona fide* holder should recite that it was performed, and this recital was made by officers who were to issue the bonds upon the performance of such constitutional condition, is hard to determine. We have seen that bonds issued beyond the constitutional limit, containing such recitals so made, were held valid by the Supreme Court of the United States;² and in another case,³ bonds which contained recitals that the constitutional provision, requiring that the time of the issue of the bonds a sinking fund should be provided to pay the principal and interest, had been provided,

¹ Craig v. Andes, 93 N. Y. 405 ;
Starin v. Genoa, 23 N. Y. 440.

² Chaffee Co. v. Potter, 142 U. S.
355.

³ Nat. Life Ins. Co. v. Huron, 62
Fed. Rep. 778.

when in fact no such provision was made, were held valid.

In the light of the above cases, it would seem that the Federal courts would be bound to hold such bonds valid.

The municipal corporation may be also estopped by its own acts, although the bonds contain no recitals and the records of proceeding do not estop them. (See chapter on Estoppel by Laches, etc.¹)

¹ See §§ 242-252.

CHAPTER XVIII.

CONSTITUTIONAL LIMITATIONS UPON THE ENACTMENT OF LAWS.

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285—Title of acts—Constitutional provisions relating to.

286—When the title is sufficient—Most perfect expression not necessary—Matter not fairly within the title to be excluded.

287—Title of amended act—What sufficient.

288—Act must contain but one subject—Object of such a provision—In New York the prohibition applies only to local acts.

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former local or special statute is repealed by a later inconsistent act.

293—Prohibition against making existing laws a part of a new act—Object of the prohibition—When the new law need not recite the old.

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§ 284. Constitutional provisions—Where found.—

The constitutions of all the States contain certain provisions affecting the general passage of laws. These provisions provide that the Legislature comply with certain conditions relative to the form as well as to the substance of the statutes which they enact. And they have been adopted with the view of curtailing the enactment of laws upon certain subjects as well as to compel more intelligent action upon the part of the legislators.

Subject to such restrictions and prohibitions found in a State constitution or the Federal constitution, the Legislature of a particular State has complete power over municipal corporations therein,¹ especially so in reference to authorizing them to contract debts and issue and sell their negotiable bonds and other evidence of debt, and, as we have seen elsewhere, may even compel them to issue their bonds to pay their just debts, and may also compel them to incur debt for some public improvement not local in its nature.² Without further digressing from the matter in hand, what is proposed to be treated here relates to the constitutional requirements imposed upon the Legislature in the enactment of laws, which relate to or affect municipal corporations.

§ 285. **Title.**—Most of the State constitutions contain provisions, the object of which is to have the title of the act express its object. The provision usually reads: "No bill shall be passed containing more than one subject, which shall be clearly expressed in the title" (Penn. Const. sec. 3, art. 3), or "No private or local bill shall embrace more than one subject and that shall be declared in its title" (N. Y. St. Const. art. 3, sec. 16), or "No private or local law . . . shall embrace more than one subject and that shall be expressed in its title" (Ill. Const. sec. 33, art. 3).

¹ *Darlington v. Mayor of N. Y.*, 63 Ill. 66; *Dill*, on 31 N. Y. 164; *State v. Fuller*, 34 Min. Corp. (4th ed.) § 65.
N. J. L. 27; *Sangamon Co. v.* ² See § 12.

The object of these constitutional provisions is to inform the legislators of the proposed legislation, and to prevent them from being deceived into voting for an object of which they know nothing or have no notice. The title is to inform them, as well as the public, of the general provisions of the proposed legislation, so that when the bill becomes a law, it becomes such after intelligent action has been taken upon it. An act without a title or enacting clause is void.¹

The constitution of New York, which requires that the subject of the act be expressed in the title, applies only to local laws.²

§ 286. **When title sufficient.**—The title need not be an index to all the contents.³ It is sufficient if the title expresses substantially the subject. It is not necessary that the most perfect expression should be adopted,⁴ but it is necessary that the title be such as fairly to suggest or give a clue to the subject.

If the title fairly gives notice of the subject of the act so as to reasonably lead to an inquiry into the body of the bill, it is all that is necessary.⁵

The cases in the various State courts wherein the title of acts have been brought into question are so numerous that it is impossible to cite or quote all of them.⁶ The above rules we believe will cover all the cases.

It must be remembered that the title of the act is a part of it, and that it limits its scope and is used in interpreting its words.⁷

¹ *Burritt v. State C. Com'rs*, 120 Ill. 322; *State v. Patterson*, 98 N. C. 660.

² *People v. Webster*, 28 N. Y. 646.

³ *Allegheny Co. Home's App.*, 77 Pa. St. 77.

⁴ *Matter of N. Y. & B. Bridge Ct. Appeals*, 72 N. Y. 527-33.

⁵ *Home's App.* 77 Pa. 77.

⁶ *People v. Miller*, 38 Mich. 383; *Sweet v. Syracuse*, 129 N. Y. 316; *Com. v. Frutchey*, 11 Pa. Co. Ct. R. 112; *Georgia M. R. Co. v. State*,

15 S. E. R. 293; *Pierce v. Smith*, (Kan.) 29 P. R. 565; *State v. Com'rs*, 45 Kan. 743; *People v. Hamil*, 134 Ill. 646; *Ex parte Cowert*, 92 Ala. 94; *Clark v. Com'rs*, 54 Kan. 634; *Com. v. Severn*, 164 Pa. 462; *Kings' Co. v. Johnson*, 104 Cal. 148, or 37 P. R. 870.

⁷ *Allen v. Com'rs.*, (N. J.) 31 Atl. R. 219; *R. R. Co. v. Riblet*, 66 Pa. St. 164; *Perkin v. Philadelphia*, 156 Pa. St. 539.

Therefore great care is needed in the drafting of the title to a bill in order to make it comprehensive enough to embrace intended provisions, because if it be not broad enough to include them all, though they be necessary and germane to the object of the bill, those not within the title will be deemed void, because courts cannot enlarge the scope of the title so as to include all the provisions, although such enlargement might have been made by the Legislature. Courts, however, construe the title in as liberal a manner as possible consistent with the words employed, so as to validate the law.¹

§ 287. **Title of amended act.**—It is a sufficient title to an act amending a former act, if the amended act recite that it is an act to amend the former act or a supplement to the former act, reciting the title of the former act and date of approval or passage, provided the legislation in the new act is germane to the object of the former act. The reference to the former act, being treated as expressing the object of the new act.²

Where the amended act did not refer to the title of the former act, but merely to a section of the revised code, it was held unconstitutional because it did not state the object of the act.³

An error in an amendatory act in stating the day of the month on which the former act was approved does not necessarily render inoperative the amendment made by the act in which such error has occurred, but should be held to be merely a clerical error.⁴

§ 288. **Act to contain but one subject.**—The constitutions of most of the States provide that no bill shall be passed containing more than one subject or object, which must be expressed in the title. This provision was adopted to prevent what is known as "log-rolling," that is, incorporating into one bill a large number of divers dis-

¹ *In re Haynes*, 51 N. J. L. 6-24. ³ *Burnett v. Taylor*, 10 S. W. R.

² *State v. Marion Co. Ct.*, 31 S. W. 194; *Calahan v. Chipman*, (Mich.) R. 23; *State L. R. R. App.*, 77 Pa. 26 N. W. R. 806.

St. 431; *Hyman v. State*, (Tenn.) 9 ⁴ *Saunders v. Provincial Municipality*, 4 So. R. 801; *State v. Babcock*, 36 N. W. R. 318.

connected interests relating to various subjects so as to obtain sufficient votes in the houses of the Legislature to pass the bill.

By this means many laws inimical to the interest of the people were passed, and it became necessary for the people, in order to protect themselves from the passage of such laws, to adopt a provision in their State constitutions which prohibited more than one subject or object to be contained in an act.

If the object of the act, as indicated by its title, is not the same as that in the body of the act, the act will be void because the title controls the object.¹

Whatever is fairly and reasonably connected with the object, or necessary to facilitate its accomplishment, is within the object of the act, and germane to it.

Cooley says :² "The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible."

The constitutional provision that the subject of an act must be expressed in its title must receive a reasonable interpretation. If the matter is fairly germane to the subject expressed by the title it is enough.³

¹ N. Y. G. L. R. Co. v. Montclair, (N. J.) 21 Atl. R. 493; *In re* Hanck, 70 Mich. 396; Cooley on Const. Lim. 179.

² Cooley on Const. Lim. 175.

³ Dallas v. Redmond, 10 Cal. 297; State v. Olson, (Minn.) 59 N. W. R. 634; Quinn v. Cumberland Co., 162 Pa. St. 55; People v. Webster, 28 N. Y. S. 646; State v. Brown, (Minn.) 57 N. W. R. 659; Travellers' Ins. Co. v. Township of Oswego, 59 Fed. Rep. 58; State v. Mines, 38 W. Va. 125; Maynard v. Marshall, 91 Ga. 840; Van Husen v. Heames,

96 Mich. 504; Gaines v. Williams, 146 Ill. 450. In the following cases the object was held to embrace more than the title of the act, and was therefore unconstitutional as to the matters not germane to the title.

Adams v. San Angelo Water Works Co., 86 Tex. 485; State v. Nomland, (N. D.) 57 N. W. R. 85; Wolf v. Taylor, 98 Ala. 254; Wilkerson v. Belknap Sav. Bk., (Kan.) 52 Kan. 718; Perkins v. City of Philadelphia, 156 Pa. St. 539; Rogers v. Union R. W. Co., 20 N. Y. S. 855; Nites v. Schoolcraft,

"An act to amend the charter of the city of Chicago," was held to permit of provisions to extend the limits of the city and to establish and provide for the improvement and regulation of public parks.¹

And an act entitled "An act to amend secs. 3, 4, and 5 of chapter 1 of an act entitled 'An act to provide a charter for the city of Detroit, and to repeal all acts in conflict therewith, being act No. 326 of the Session Laws, 1883, and to add three new sections,'" was held to permit of the extension of the boundaries of the city and to modify and enlarge the powers of the city government, the court holding the provisions of the act to be germane to the general object of the act.

"An act to amend an act establishing a new charter for the city of Atlanta," was held to embrace a provision that street railroad companies should be required to pave their tracks.² A local act, entitled "An act in reference to the collection of taxes," may provide for the entire system of collection, including sales and conveyances, without being open to the objection of embracing more than the subject embraced in the title.³

An act to provide a charter for a city is sufficiently broad to include in the act all the necessary provisions relating to the city government.⁴ And an act to amend a city charter is unconstitutional so far as it contains provisions not relating to city government.⁵ The title, "An act to provide for the drainage and sewerage in cities of this State," is sufficiently broad to permit of a provision authorizing cities to carry their sewers through adjacent townships to tide-water.⁶

It was held that "An act to create a new charter for the city of Columbus, and to consolidate and declare the rights and powers of the corporation, and for other purposes," was unconstitutional in so far as it provided for

Cir. Judge, (Mich.) 60 N. W. R. 1. ³ *Ensign v. Barse*, 107 N. Y. 329, 771; *Commonwealth v. Samuels*. ⁴ *State v. Wood*, 49 N. L. J. 85; 163 Pa. St. 283; *Simon v. Northrup*. *People v. Mahoney*, 13 Mich. 181. (Or.) 40 P. R. 560. ⁵ *Wulf tang v. McCallom*, 83 Ky.

¹ *Prescott v. Chicago*, 60 Ill. 21. 361.

² *Atlanta v. Gate City R. R. Co.*, ⁶ *State v. Orange*, 26 Atl. R. 799, 4 S. E. R. 269.

extending and exercising municipal police jurisdiction over territory adjacent to the city, since the title of the act afforded no indication of any extension of power whatever beyond the corporate limits.¹

The title of an act to incorporate a railroad company is broad enough to cover provisions that counties to be benefited by the proposed improvement may take stock and issue bonds, or donate bonds.²

Sometimes the title of the act has added to it the words, "And for other purposes," or words of similar import. They are now held to be meaningless and convey no idea of legislative intent, and cannot be regarded as expressing any object.³

The constitution of New York State, which prohibits more than one subject to be embraced in the title and bill, applies only to local acts.⁴

§ 289. **When the act embraces more than one object.**—If the act embraces more than one object, and the title of the act also does so, the act will be void, because the court cannot say which should stand and which should fall.⁵ But if the title embraces but one object, and the act itself embraces two or more, then so much of the act as is not germane to the title will be inoperative and void, while the balance of the act, that properly embraced within the title, will stand; provided it can be separated from the other object or objects, and is not dependent on them;⁶ and provided further, that the constitutional provision on this subject does not, in express words, render void any act which contains two subjects.

When an act embraces in its body two or more subjects, and one of these, not within the title, is a repeal or

¹ Blair v. State, (Ga.) 17 S. E. R. 96.

² Supervisors v. People, 25 Ill. 181; State v. County of Wirt, (W. Va.) 17 S. E. R. 379.

³ Pitkin Co. v. Aspin M. & S. Co., 32 Pac. Rep. 717; Cooley on Const. Lim. 177.

⁴ *In re* Malon W. W. Co., 15 N. Y. S. 649.

⁵ State v. McCracken, 42 Tex. 383.

⁶ Yerly v. Cochran, 14 So. R. 355; Sanilac v. Auditor-Gen., 36 N. W. 794; Ellis v. Hutchinson, 70 Mich. 151; Catron v. Commis., 23 P. R. 513; Adams v. San Angelo W. Co., 25 S. W. 605; Dempsey v. State, (Ga.) 22 S. E. R. 57; Cooley on Const. Lim. (6th ed.) § 177.

amendment of some former law, the former law will remain in force and be unaffected by the repugnant part of the subsequent act.¹

§ 290. **Amendments to former acts.**—Many of the State constitutions provide that, in order to revise or amend a former act, the sections revised or amended shall be set forth and published in full. The provision sometimes reads as follows : “ No act shall be revised or amended by mere reference to its title, but the act revised or amended shall be set forth and published at full length ” (Oregon Constitution, sec. 22, art. 4) ; or “ No law shall be revised or amended by reference to its title only, but the act revised, or the section or sections amended, shall be inserted at length ” (New Jersey Const. sec. 7, art. 4) ; or “ No act shall be revised or re-enacted by mere reference to the title thereof, nor shall any act be amended by providing that designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof ; but in every such case the act revised or re-enacted, or the act or the part of the act amended, shall be set forth and published at length, as if it were an original act or provision ” (Missouri Const. art. 4, sec. 33).

The provisions of the other State constitutions are to the same effect, although the language may not be all alike.

The object of these provisions is to compel Legislatures to enact laws which are complete in themselves, so far as they embrace the matter within them, and to avoid the necessity of a comparison of the amended act with the amendatory one, so as to discover what the law is. Under these provisions the legislators have an intelligent knowledge of what they are acting upon, while, if such provisions did not exist, an act could be amended by striking out some words in the former act, or inserting words, which would so change the meaning of the former act or state of the law, and that without the knowledge of the legislators, as to lead to fraud as well as confusion, so that in the end no man could say just what the present state of law was.

¹ Evans v. Willistown, 32 Atl. Rep. 87.

Under these provisions it is held that it is not necessary to set out the section to be amended, but it is sufficient if the section, as amended, be set out in full, and the whole act as amended need not be set out,¹ but when the entire act is revised then it must be set out, as revised, in full.²

§ 291. **Amendment by implication.**—A statute may be amended or repealed by implication, as where an act not amendatory in character, but original in form and complete in itself, exhibiting on its face what the law is to be, its purpose and scope is enacted, such act is valid, notwithstanding it may in effect change or modify some other law upon the same subject.³

Where a new statute covers the whole subject-matter of the old, adds new offences, and prescribes new penalties, the former is repealed by implication.⁴ Where the whole subject-matter of an earlier statute is revised by a later one, there is a repeal by implication.⁵

When a statute amends a former statute, "so as to read as follows," it operates as a repeal by implication of inconsistent provisions in the former law and of provisions omitted in the amended law. But when the amended act re-enacts provisions in the former law either *ipsissimis verbis*, or by the use of equivalent though different words, the law will be regarded as having been continuous; and the new enactments as to such parts will not operate as a repeal so as to affect a duty accrued under the prior law, although as to all new transactions the latter act will be referred to as the ground of the obligation.⁶

¹ State v. Thurston, 92 Mo. 325; State v. Amr. F. Co., 11 Atl. R. 127; Denver C. R. v. Nestor, 15 Pac. R. 714; Purvis v. Ross, 27 Atl. R. 882; People v. Upson, 79 Hun 87; State v. Hancock, 51 N. J. L. 293; Cooley on Const. Lim. p. 185.

² David v. Portland, 12 Pac. R. 171.

³ Warren v. Crossby, 34 Pac. R. 661; People v. Mahoney, 13 Mich.

496; Evernham v. Hulit, 45 N. J. L. 534; Lehman v. McBride, 15 Ohio, 603.

⁴ State v. Welle, 112 Ind. 237; Mersereau v. Mersereau Co., (N. J.) 26 Atl. Rep. 682; Koons v. Clugish, (Ind.) 34 N. E. R. 651.

⁵ Keese v. Denver, 10 Colo. 112.

⁶ *In re Prime's Estate*, 136 N. Y. 247; People v. Upson, 79 Hun 87.

The law does not favor a repeal by implication,¹ and unless the subsequent act contains provisions which are inconsistent with the former law, so that the former law cannot stand, it will not be held to be repealed. The courts endeavor so to construe each act that it will not repeal, by implication, another, and the subsequent act in order to act as a repeal of a former one must be so extensive and so clearly inconsistent and repugnant to an existing law that they cannot consistently stand together, then the latter becomes by implication an amendment or repeal of the former inconsistent law.²

§ 292. **Repeal of local or special laws.**—Some of the State courts hold that a local or special statute is not repealed by implication by a subsequent general one on the same subject, and that in order to operate as a repeal the subsequent act must contain such intention in express language.³

A case in Pennsylvania⁴ is in point, where it was held that while it is the general rule that a later statute might repeal a former one, without express language to that effect, by implication, yet a local statute enacted for a particular municipality, for reasons satisfactory to the Legislature, is intended to be exceptional for the benefit of such municipality, and that it is not reasonable to suppose that the Legislature intended to repeal such a special act, which local circumstances made necessary.

It, however, is the general rule that while the courts do not favor the repeal by implication of a statute, and particularly a local or special one, yet if the subsequent general statute in its terms covers the subject of the special one, showing in strong language it is intended to take the place of it, the general act will be held to super-

¹ *Snell v. Bridgewater, etc.*, 41 Mass. 296.

² *State v. Brown*, 8 Ohio C. Ct. R. 103; *Com. v. Kempsmith*, 13 Pa. Co. Ct. R. 667; *Com. v. Melville*, 160 Mass. 307; *Hunter v. Memphis*, 26 S. W. R. 828; *State v. Luther*, (Minn.) 57 N. W. R. 461; *Hopkins v. Scott*, (Neb.) 57 N. W. R. 391; *Pa. St.* 25.

People v. Board of Com., 113 N. Y. 481; *Comrs. v. Deboe*, 43 Ill. App. 25.

³ *City of Reading v. Shepp*, 2 Pa. Dist. R. 137; *President v. Rushville*, 32 Ill. App. 320; *People v. Canvasers*, 43 N. Y. 81.

⁴ *Malley v. Commonwealth*, 115

sede the special, although it does not contain express words of repeal.¹

§ 293. **Prohibition against making existing laws a part of new act.**—The constitutions of some of the States provide that no act shall be passed making existing laws a part of said act or be applicable under it, except by inserting it in such act.

The object of such provision is to inform the members of the Legislature of the nature of the proposed legislation, and to provide that the bill proposed to be passed will disclose on inspection what particular rights or privileges are designed to be conferred by it.

This constitutional prohibition is to be construed rather as to its spirit than its letter, because if construed strictly it would operate so as to prohibit any reference to other laws, and would invalidate untold numbers of legislative enactments.

It is very common practice to incorporate in laws, especially those relating to public officers, a provision that such officers shall have the powers and capacities vested by existing legislation in other officers or boards, or that they should proceed to perform their duties in the manner indicated by designated existing laws. If this reference to existing laws is prohibited all such legislation is unconstitutional.

In the well-considered case of *People v. Lorillard et al.*, 35 N. Y. 285-290, where it was claimed that an act which provided for the appointment of commissioners to condemn lands, and which provided that the commissioners, when appointed, should proceed to condemn the lands in the manner pointed out in a certain law, which was named, was unconstitutional because of such reference, the court by O'Brien, J., said :

“This appeal cannot be sustained without holding in effect that every statute, general or local, must contain within itself every detail necessary to its complete execution, and that when the lawmakers desire to adopt the procedure or some other matter of detail contained in a

¹ *Haynes v. Cape May*, 52 N. J. L. 174; *Dill. on Mun. Corp.* Vol. 1, § 180-2; *Brown v. Lowell*, 8 Met. 87.

local statute, that cannot be done by a suitable reference, but the same must be cut out of the other statute and actually inserted in the new one *mutatis mutandis*. . . .

“Their purpose (the framers of the constitution) was to require bills introduced in the Legislature to be presented in such form, and their essential provisions expressed in such language, that the effect of the proposed enactment might be understood by legislators of reasonable intelligence. . . .

“When a general statute, in itself and by its own language, grants some power, confers some rights, imposes some duty or creates some burden or obligation, it is not in conflict with this section of the constitutional provision because it refers to some existing statute, general or local, for the purpose of pointing out the procedure, or some administrative detail necessary for the execution of the powers, the enforcement of the right, the proper performance of the duty, or the discharge of the burden or obligation.”¹

In New Jersey, the constitution of which has such a prohibition, the courts hold that the object of the constitution was not to curtail or embarrass the Legislature in the enactment of laws, but the purpose was to obtain a fair and intelligent exercise of the lawmaking power. It has therefore been decided that an act of the Legislature which is complete and perfect in itself, the purpose, meaning and full scope of which is apparent on its face, is valid, though it may provide for actions or means of carrying its provision into effect by reference to a course of procedure established by other acts of the Legislature.²

But where an act gave certain active and expert firemen the same privileges as allowed to members of the national guard, by an act referred to, the act was held to be imperfect, incomplete and unconstitutional, because it referred to another existing law.³

§ 294. **Uniform operation.**—Another constitutional

¹ *People v. Bank*, 67 N. Y. 568; *In re U. F. Co.*, 98 Ib. 139; *Union Ferry Co.*, 98 N. Y. 158.

² *Campbell v. Board of Pharmacy*, 16 Vr. 245.

³ *Christie v. Bayonne*, 49 Vr. 407.

requirement is that "All laws of a general nature must have a uniform operation." This provision is found in many of the State constitutions, and its object is to require the Legislature to enact general laws for an object which is applicable to all localities.¹

In order to constitute the uniformity of operation required by the constitution, it is not necessary that the law, in order to be general, should operate upon all the subjects or persons to which it applies *at one time*, but it is sufficient that it operate uniformly on all persons or things standing in the same category and relation.¹

The law must be general as to the subject to which it relates, and its application must be uniform as to all persons and things embraced within it; or if the subject of the law is divided into classes, the provisions applicable to each class must apply to all matters or things included in such class.²

It must not grant to any citizen or class of citizens privileges which, upon the same terms and under like circumstances, shall not equally belong to all citizens.³

It is not necessary that the act take effect at the same time so long as it operates uniformly upon the objects embraced when they come within the scope of the act.⁴

An act to prevent the removal from office of soldiers and sailors of the late rebellion, so drawn as to apply only to those in office *at the time of the passage of the act*, is a special and not a general law having a uniform operation. While the sailors and soldiers of the late rebellion form a class of citizens, and a law applicable to all, as a class, would be general, but if applicable to only a part of that class is special and in contravention with this requirement of the constitution.⁵

¹ Young v. Board, 36 N. E. R. 1118; State v. Hoskins, (Minn.) 59 N. W. R. 545; Kitchen v. Magee, (Mo.), 30 S. W. R. 523; Root v. Board of Ed., (Ohio) 41 N. E. R. 135; Com. v. M. & M. N. Bk., 168 Pa. 309; Com. v. Brown, (Va.) 21 S. E. R. 357; State v. Anderson, (Wis.) 63 N. W. R. 746; W. U. T. Co. v. Poe, 64 Fed. Rep. 9

² Smith v. Judge, 17 Cal. 554; State v. Bargas, (Ohio) 41 N. E. R. 245; Mimiela Co. v. Thorne, (S. D.) 61 N. W. R. 688.

³ Brooks v. Hyde, 37 Cal. 366.

⁴ People v. Henshaw, 18 P. R. 413.

⁵ Pierson v. O'Connor, 54 N. J. L. 36.

§ 295. **Same.**—An act is general and has a uniform operation, although so drawn that it is not to go into operation in any one locality until accepted by the voters thereof,¹ and as said in a case in New Jersey,² where an act to authorize the mayor of any city, adopting its provisions, to appoint the principal municipal officers, “the fact that some cities are not in a condition to accept the act does not arise out of any special or local character of the act itself, but out of the dissimilarity of the various charters which came into existence before the recent amendments to the constitution.

“If the test is that every act submitted for acceptance must be equally applicable and beneficial to all localities, it will be impossible to frame statutes to be submitted for adoption which will not be infirm. . . .

“The necessity for submission to the popular will in every case will stand as a guard against vicious legislation under such a system.”

An act which provided that the county commissioners of any county containing a city of the second class, third grade, should provide a depository for the county funds, and that no warrant payable from such fund should be drawn unless there was sufficient money to meet it, was held to be in contravention of the requirement of the constitution of Ohio, art. 2, sec. 26, requiring all laws of a general nature to have a uniform operation throughout the State. The object of the act was general, but its operation was by the act confined to certain counties.³

The constitution of New York does not require laws to be uniform in their operation throughout the State.⁴

§ 296. **Local and special laws.** The constitutions of many of the States contain a provision to prevent the passage of special or local laws relating, among many

¹ *Com. v. Reynolds*, 137 Pa. St. 389.

² *Rider v. Mt. Vernon*, 33 N. Y. 715.

³ *In re Cleveland Mayor*, 52 N. J. L. 188.

⁴ *State v. Somers*, 26 Wkl. L. Bul. 102. See *Hart v. Murray*, 48 Ohio, 605.

On this subject see note of Mr. Pomeroy, page 534 of *Sedgwick, on Construction of State & Const. Law*, Cooley on Const. Lim. § 68, 607-615.

other subjects, to the internal affairs of municipalities, or their government. The prohibition is expressed in different forms, as "The Legislature shall not pass private, local or special laws . . . regulating the internal affairs of towns and counties" (New Jersey Const. sec. 7, art. 11), or "The General Assembly shall pass no special act conferring corporate powers" (Ohio Const. sec. 1, art. 13),¹ or "The General Assembly shall not pass any local or special law regulating the affairs of counties, cities, townships, wards, boroughs or school districts" (Pennsylvania Const. art. 3. sec. 7). Sometimes it is found in this form: "In all cases where a general law can be made applicable no special law can be made applicable" (Minnesota Const. sec. 33, art. 4).

The purpose of these prohibitions is to compel the passage of laws relating to any subject applicable to municipalities to be put in the form of a single act, so as to make legislation on a single subject relating to municipalities uniform and easily found and understood.

The further purpose is to obtain better legislation on the subjects within the prohibition, because, if the operation of the act is general as to the municipalities it operates upon, all the members of the houses of the Legislature, although coming from all parts of the State, are interested in it, therefore they are all compelled to become acquainted with the proposed legislation in order to act intelligently upon it. This is the theory of the purpose of the prohibition. In practice it is found quite different, and every ingenious device, all the cunning and knowledge of able lawyers, are resorted to, in order to escape from the operation of the prohibition, and pass laws which, having the semblance of general laws, are yet special in fact and operation. The very purpose of this constitutional requirement often makes it necessary

¹ This provision in most of the States where found is held to apply to all corporations, whether municipal or private. In New Jersey it is held only to apply to private corporations. *State v. Newark*, 40 N. J. L. 558. So, also, in Massachusetts, *Linnahan v. Cambridge*, 109 Mass. 212. In Nebraska it has been held to include a school district, and bonds issued under a special act were declared invalid. *School Dist. v. Insurance Co.*, 103 U. S. 707.

so to do. Some particular locality or a corporation, municipal or private, or some particular person, want some act passed which the constitution requires shall be done by a general statute. A general bill is introduced, and at once the legislators who do not favor the bill begin to object to it; it is then amended to suit the various objections, and at last it comes out of the legislative mill a special act, or one so nearly so as to be open to criticism and objection, and it is only after it has been rejected or affirmed by the courts, that the question, whether or not the act is constitutional, is finally determined. Hence the many cases for the construction of these acts in the courts.

§ 297. **Classification of municipalities.**—As this work is upon the subject of municipal finances, it is proposed to confine the question of the prohibition to municipal corporations.

The courts of the various States, construing the prohibition according to its spirit and not according to its letter, have sanctioned a general classification of the municipalities according to their population or needs, so that an act may be passed in relation to a subject which will affect one class or grade and not operate upon any other class or grade.

Under a general act of May 23, 1874, the Legislature of Pennsylvania divided the cities of the State into three classes: 1st, those cities containing a population exceeding 300,000; 2d, those cities containing a population of less than 300,000 and more than 100,000; 3d, those cities containing less than 100,000 and more than 10,000.

When the act was passed, there was only one city of the first and one of the second class, but many of the third. The act provided, as all acts usually should do, that a city of any of the lower grades would, when it had the necessary population, become a city of the grade its population then called for, upon doing certain acts. The act also provided that as many of the cities of the third class had private charters, such cities need not surrender their charters and come in under the general law, which provided for full governmental machinery for each class,

unless they saw fit, and their intention to do so should be evidenced in the manner marked out in the act. This act has been held to be constitutional in a number of cases.

In *Wheeler v. Philadelphia*, 77 Pa. St. R. 338, it was attacked because it was held that it indirectly legislated for Philadelphia, that being the only city of the first class, and that the act was therefore special and local.

Mr. Justice Paxson, who delivered the opinion of the court sustaining the act, in part said: "A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special and comes within the constitutional prohibition.

"But it is contended that even if the right to classify exists, the exercise of it by the Legislature, in this instance, is in violation of the constitution, for the reason that there is but one city in the State with a population exceeding 300,000; that to form a class containing but one city is in point of fact legislating for that one city to the exclusion of all others, and constitutes the local and special legislation prohibited by the constitution. This argument is plausible, but unsound. It is true the only city in the State at the present time containing a population of 300,000 is the city of Philadelphia.

"It is also true that the city of Pittsburgh is rapidly approaching that number, if it has not already reached it, by recent enlargements of its territory.

"Legislation is intended, not only to meet the wants of the present but to provide for the future. It deals not with the past, but in theory, at least, anticipates the needs of a State, healthy with a vigorous development. It is intended to be permanent. At no distant day Pittsburgh will probably become a city of the first class. And Scranton or others of the rapidly growing interior towns will take the place of the city of Pittsburgh as a city of the second class. In the meantime is the classification as to the cities of the first class bad, because Philadelphia is the only one of the class? We think not. Classification does not depend upon numbers.

"If the classification of cities is in violation of the constitution, it follows of necessity that Philadelphia, as a city of the first class, must be denied the legislation necessary to its present prosperity and future development, or that the small inland cities must be burdened with legislation wholly unsuited to their needs. For if the constitution means what the complainants aver it does, Philadelphia can have no legislation that is not common to all other cities of the State, and for this there is absolutely no remedy but a change in the organic law itself."

The same act was also affirmed as constitutional in the later case of *Reading v. Savage*, 124 Pa. St. 328.¹

In a late case in Pennsylvania² the question whether an act entitled "An act providing for the incorporation and government of cities of the third class" (P. L. 1889, 277), which contained provisions for the annexation of territory, was special or not, was submitted to the Supreme Court of the State, and it was held that the act, being for the class and applicable to every member of it, was general.

In Pennsylvania, as we have seen, it is held that an act which applies to every member of the class is constitutional, and in the case of *Scranton v. White*, 23 Atl. Rep. 1043, where the court held an act which provided a system of government for all cities of the third class, regulating the manner in which the power to pave streets and collect the costs which was contended to be local, to be general, laid down the rule that "laws limited in their operation to a single class of cities are not therefore within the constitutional prohibition of local legislation, if they relate to matters that are connected with the organization or regulation of municipal affairs.

"If such laws relate to other subjects not within the purposes of classification, they fall within the prohibition," citing *Snowden's Appeal*, 96 Pa. 425; *Davis v.*

¹ See also *Kilgore v. Magee*, 85 Pa. 401. ² *Appeal of Harris*, 28 Atl. 927.

Clarke, 106 Pa. 377; *McCarthy v. Commissioners*, 110 Pa. 243.¹

In Pennsylvania, it is held that in order that an act legislating for a special class should be constitutional, that class must be distinguished by some peculiarities or necessities, from the others, and that unless there existed a necessity for special legislation, springing from manifest peculiarities, clearly distinguishing those of one class from another, such legislation would be special.²

§ 298. **In New Jersey**, counties, cities and boroughs are divided into classes by statute.

The cities are divided into four classes :

1. Those having a population exceeding 100,000.
2. Those having a population between 12,000 and 100,000.

3. Those having less, except the fourth, which are all those cities lying on the Atlantic Ocean, and being a sea-side and summer resort (Act of March 4th, 1882).

It will be observed that the fourth class is not divided from the others by population, but because of locality.

Almost all the other States have divided the municipalities into classes, and some subdivided the class into grades of a class.

In all these acts there are provisions by which a city of one class, upon reaching the required population of the next higher grade, may enter into the latter grade. These acts have been sustained in their respective State courts.³

§ 299. **Municipalities are usually graded.**—In some of the States the courts hold an act to be constitutional if it be so drafted that its provisions apply only to municipalities of a certain grade, provided it contain a provision that it will operate upon municipalities of a lower

¹ *Ayers' Appeal*, 122 Pa. St. 266; *State v. Berka*, 20 Neb. 375; *Topeka*

² *Ayers' Appeal*, 122 Pa. St. 266; *v. Gillett*, 36 Kan. 431; *Land Co. v. Morrison v. Backert*, 112 Pa. 322; *Brown*, 73 Wis. 294; *Ex parte Swan*, *Seranton School Dist.*, *Appeal*, 113 96 Mo. 41; *State v. Hawkins*, 44 Pa. 176; *Gardiner v. Chester*, 2 Pa. Ohio, 98; *Bench v. Hardwick*, 30 Dist. R. 162. *Gratt.* 31; *In re Passaic*, 54 N. J.

³ *Kilgore v. Magee*, 85 Pa. 401; *L.* 156.
Daniels v. Henshaw, 76 Cal. 426;

grade when they enter the grade the act is operative upon, and this, although the grade contain no peculiar features which call for the particular object of the act, while some of the States require that there be at least a possible reason for the legislation for one grade as distinct from that of another.

We will now refer to some of the cases holding the former view.

§ 300. **In Ohio**, in the case of the State *ex rel.* Attorney-General v. Toledo, Ohio, 26, N. E. R. 1061, where the act contended to be unconstitutional because local was "An act to authorize cities of the third grade of the first class, to borrow money and issue bonds therefor, for the purpose of procuring territory and right of way, and sinking wells for natural gas, purchasing wells, etc. . . . and supplying such cities with natural gas for public and private use and consumption." It was claimed that the act was not intended to apply to any other city than Toledo, and was in conflict with art. 1, sec. 13, of the constitution, which provides that "the General Assembly shall pass no special act conferring corporate powers."

The court held the act to be constitutional because any city might enter the grade and class.

The court said: "It is the possibility that other cities may enter a certain grade of a class, and not the certainty that they will, that gives to a law creating the grade a general character."

In another case,¹ in the same State, the court held an act which applied to municipalities of one grade, or a class of a grade, and permitted others when they entered the grade or class, to participate in the act, to be valid. The court in this case said: "Grave doubts may well be entertained as to the constitutionality of this method of classifying cities for the purpose of general legislation.

"But it has received the sanction of this court in repeated decisions heretofore made, and in view of this fact, and the rule that forbids a court to declare a law enacted by the Legislature as unconstitutional, unless

¹ State v. Wall, 24 N. E. R. 897.

clearly convinced that it is so, we do not feel warranted in doing so in this instance."

When the act cannot apply but to the class named, then the courts of Ohio hold the act local and special. The following cases illustrate the point.

In the case of *State v. Smith*, 26 N. E. R. 1069, the court held an act which created a board of city affairs in cities of the first grade, of the first class, to be local, because the act required that the bonds to be given by the members of the board be approved by the Superior Court of the city, and as but one city (Cincinnati) had a Superior Court, the act was therefore not applicable to any other, as the special court had been created by a special act before the adoption of the constitution. The court held that an act to be general must apply to all cities of the class, and permit others to partake of it when they enter the class, although it vigorously denounced such classification of cities.

The Supreme Court¹ held an act, whose title was "An act to provide for improvements of streets and avenues in certain cities of the second class," to be unconstitutional, because in conflict with sec. 1, art. 13, of the State constitution, which section is as follows:

"The General Assembly shall pass no special act conferring corporate powers."

The word corporation was construed to include all corporations, municipal as well as private.

The act only applied to cities of the second class having a population of over 31,000 at the last Federal census. Columbus was the only city having that population.

The court said: "The effect of the act would have been precisely the same if the city had been designated by name instead of the circumlocution employed."

An act which authorized a named municipality to issue bonds without submitting the question to a vote of the electors is a special act conferring corporate powers,² as is

¹ *State v. Mitchell*, 31 Ohio, 592.
See also, *State v. Anderson*, 44 Ohio,
247; *Carr v. West Carrollton*, 8
Ohio Ct. R. 1.

² *Ger. A. In. Co. v. Youngston*,
68 Fed. Rep. 452. See also, *Alter*
v. Cincinnati, 1 Ohio N. P. 394.

also an act giving cities of the first grade of the first class power to issue bonds to meet deficiencies due at a certain period, there being but one city of that grade, though there was another which had the requisite population, but could not enter the grade until after the time fixed when the deficiencies were due, so that no other city could take advantage of the act.¹

The courts of Ohio have held that the prohibition relative to local legislation does not include a police board,² or other boards in cities, or school districts, and other similar organizations.³

The courts have also held that the charter of a city cannot be amended by a special act.⁴

§ 301. In New York, where the prohibition against local laws extends, so far as it relates to municipalities, only to certain subjects,⁵ the courts hold that if the act

¹ Herman v. Cincinnati, 9 Ohio Cir. Ct. 357; State v. Schwab, 34 N. E. R. 736.

² State v. Covington, 29 Ohio. 103.

³ State v. Powers, 38 Ohio, 54.

⁴ State v. Cincinnati, 20 Ohio, 18.

⁵ See art. 111, § 18, present constitution.

In New York the cities are divided into classes, and the manner of passing special laws applicable thereto regulated by the new constitution, art. xii. § 2, which reads as follows :

“ Classification of cities ; general and special city laws ; special city laws ; how passed by Legislature and acceptance by cities. § 2. All cities are classified according to the latest State enumeration, as from time to time made, as follows : The first class includes all cities having a population of two hundred and fifty thousand, or more ; the second class all cities having a population of fifty thousand and less than two hundred and fifty thousand ; the third class, all other cities.

Laws relating to the property, affairs or government of cities, and the several departments thereof, are divided into general and special city laws ; general city laws are those which relate to all the cities of one or more classes ; special city laws are those which relate to a single city, or to less than all the cities of a class. Special city laws shall not be passed except in conformity with the provisions of this section. After any bill for a special city law, relating to a city, has been passed by both branches of the Legislature, the house in which it originated shall immediately transmit a certified copy thereof to the mayor of such city, and within fifteen days thereafter the mayor shall return such bill to the house from which it was sent, or if the session of the Legislature at which such bill was passed has terminated, to the governor, with the mayor's certificate thereon, stating whether the city has or has not accepted the same.

“ In every city of the first class,

apply to a class of municipalities it is sufficient, and do not intinate that the act need provide for municipalities so that they can enter the class, or that the class legislated for should have some peculiar need for the legislation, as distinct from those outside of the class.

The leading case in reference to special legislation, although it did not affect a municipal corporation, is that of *In the Matter of the Elevated R. R. Co.*, 70 N. Y. 327, 350, where the Court of Appeals, by Earle, J., *inter alia*, said: "But a law may be general without affecting all the people.

"A law regulating the rights of married women, or of minors, or of adults, or of aliens, would be general, and it would be general although confined to the persons in being at the time of its passage. So a law conferring new rights upon all existing insurance companies, or railroad companies, or manufacturing companies, would be general."

The court further said: "Does the validity of a law which is required to be general, and which is general in its terms, depend upon the number of subjects upon which it can operate, or upon the size of a class to which

the mayor, and in every other city, the mayor and the legislative body thereof concurrently, shall act for such city as to such bill; but the Legislature may provide for the concurrence of the legislative body in cities of the first class. The Legislature shall provide for a public notice and opportunity for a public hearing concerning any such bill in every city to which it relates, before action thereon. Such a bill, if it relates to more than one city, shall be transmitted to the mayor of each city to which it relates, and shall not be deemed accepted unless accepted as herein provided, by every such city. Whenever any such bill is accepted as herein provided, it shall be subject, as are other bills, to the action of the governor. Whenever, during the session at which it was passed, any such bill is returned without acceptance of the city or cities to which it relates, or within such fifteen days is not returned, it may nevertheless again be passed by both branches of the Legislature, and it shall then be subject, as are other bills, to the action of the governor. In every special city law which has been accepted by the city or cities to which it relates, the title shall be followed by the words, 'accepted by the city,' or 'cities,' as the case may be; in every such law which is passed without such acceptance, by the words 'passed without the acceptance of the city,' or 'cities' as the case may be."

it applies? These questions must be considered in the negative. . . ."

In the Matter of the Application of Church, 92 N. Y., it was held that an act giving the board of supervisors of counties containing an incorporated city of over 100,000 inhabitants power to lay out streets was a general act. The court, by Finch, J., said: "It is not easy to define with accuracy the difference between the two forms of legislation, and the difficulty is better solved by adding examples to definitions. Of the latter, the most useful and accurate is that in the matter of the N. Y. E. R. R., 70 N. Y. 328.

"A law relating to particular persons or things as a class was said to be general, while one relating to particular persons or things of a class was deemed local and private. The act of 1881 (under consideration) relates to a class, and applies to it as such, and not to the selected or particular element of which it is composed. The class consists of every county in the State having within its boundaries a city of 100,000 inhabitants, and territory beyond the city limits mapped into streets and sewers.

"How many such counties there are now, or may be in future, we do not know, and it is not material that we should. Whether many or few, the law operates upon them all alike, and reaches them, not by selection of one or more, but through the general class of which they are individual elements."¹

§ 302. In **Kansas**, the constitution, sec. 1, art. 12, forbids the Legislature to pass any special act conferring corporate powers.

In the case of *City of Topeka v. Gillett*, 32 Kan. 131; 4 Pac. R. 800, the court laid down the following rule as to what constitutes general legislation:

"If the act has room, within its terms, to operate upon all of a class of things, present and prospective, and not merely upon one particular class of things existing at the time of its passage, the act is general." And in

¹ For further cases see *Matter of Board of Sup. West. Co.*, 139 N. Y. Application of *East River Bridge*, 524, 143 N. Y. 249; *Jeremiah Clancy v.* ¹

State v. Hunter, 38 Kan. 590, the court said: "It is not necessary that an act should operate upon all the cities of the State to be constitutional.

"If it is general and uniform throughout the State, operating upon all of a certain class, or upon all who are brought within the relations and circumstances provided in the act, it is not obnoxious to the limitations against special legislation."

The court, in *State v. Kansas City*, 31 Pac. Rep. 1100, said, in speaking of class legislation: "Heretofore it has been based upon population only, but it has been generally recognized that other classification might be made without offending the constitution."

In this State, so long as the municipal corporation of one grade may enter into the other, an act applicable to one is not special.¹

In this State the courts held an act which applied to but three cities of the second class to be special, and that the court would take judicial notice of the fact that the act only applied to the three cities.²

And in another case the courts held an act which authorized a single city to issue its bonds was special and unconstitutional.³

The courts of this State held that the prohibition does not include school districts, because they are not corporations, but does include cities, towns and villages.⁴ The courts of this State also held an act which authorized a certain designated township (Oswego) to compromise and fund its indebtedness and to issue its bonds therefor, was special and therefore unconstitutional,⁵ but on appeal the court held that the prohibition did not include townships.⁶

§ 303. **In Nebraska**, where the constitution prohibits the Legislature from passing special acts "conferring

¹ *State v. Hunter*, 38 Kan. 590; Dill. C. C. R. 353; *State v. Malloy*, 17 Pac. R. 179; *State v. Kansas City*, 3 P. R. 1100-1102.

² *Topeka v. Gillett*, 35 Kan. 431.

³ *Cleveland v. City of Iola*, 2

⁴ *Beach v. Leachy*, 11 Kan. 22.

⁵ *Travellers' Ins. Co. v. Oswego Tp.*, 53 Fed. Rep. 361.

⁶ Same case, 59 Fed. Rep. 58.

corporate powers," it has been held that the prohibition did not extend to a county, as a county is not a corporation under the Kansas constitution,¹ and the Supreme Court of the United States has adopted this view when construing a Nebraska statute.² School districts are regarded in this State as municipal corporations, and the prohibition includes them, and therefore a special act authorizing a school district to issue bonds was unconstitutional.³

§ 304. **In Illinois**, the Supreme Court, in the case of *Devine v. Comrs. of Cook Co.*,⁴ held an act which authorized the board of commissioners of counties containing over 100,000 inhabitants by a two-thirds vote to issue bonds for certain purposes to be unconstitutional, because local and special, as it could only apply to one county—Cook County. The act provided that it would apply to all counties having such a population within six years after its passage.

The court on this point said: "Its very terms preclude it from having any application to any county, except the county of Cook, for we take judicial notice no other county in the State contains over one hundred thousand inhabitants, nor can it be expected, by any ordinary influx or increase of population, that any other county will have that population within the brief period fixed for the duration of this law, viz., within a period of six years from the time the act should take effect. No express words that could have been used by the General Assembly could limit the operation of this law to the county of Cook more absolutely and definitely than those employed."

The Supreme Court, in a later and much quoted case,⁵ held that an act which enabled the park commissioners of Chicago to make certain improvements was constitutional, although there were no park commissioners except

¹ *Jefferson Co. v. People*, 5 Neb. Neb. 178; *School Dist. v. St. Joseph* 127; *Wood v. Colfax Co.*, 10 Neb. F. M. Ins., 103 U. S. 707.
552.

⁴ 81 Ill. 590.

² *Sherman Co. v. Simonds*, 109 U. S. 765.

⁵ *West Chicago Park Com. v. McMullen*, 134 Ill. 170.

³ *Clegg v. School Dist. No. 56*, 8

in Chicago, because under the act the park commissioners of any city could exercise the power conferred by it.

The court said : " The act applies to all cities of the State having parks under the control of park commissioners. . . . If it be true, as suggested, that the act is applicable to the conditions existing in a single city in the State, that fact does not necessarily render it local and special legislation.

" It is general in its terms, and applies to all cities of the State which, at the time of its passage, had parks under the control of park commissioners, or *that might at any time* thereafter so have parks. If, because only a single city had such parks, an act general in its application to all cities would be local or special legislation, no valid act could be passed affecting such existing parks ; and it would necessarily result from such holding that substantially all of the park legislation enacted since the adoption of the present constitution should for the same reason have been invalid."¹

§ 305. **Peculiarities required in some States.**—In a number of the States the mere classification of the municipalities and legislating for each class is not sufficient, but in addition to the classification, the object of the law must bear some peculiar relationship to the class legislated for, which is not so applicable to the other municipalities.

§ 306. **In New Jersey** the courts have adopted this view, and in deciding an act relating, according to its terms, to but a portion of the cities or other municipalities, seek to find some peculiar relationship between the object of the act and the municipalities it operates upon, and failing to find which, the act is held to be special and therefore unconstitutional.

Chief Justice Beasley, in the case of *The State v. Hammers*,² held an act which applied only to two cities and could never apply to more, because of the basis of classification and object, to be unconstitutional, and laid down the rule in the following language : " The true principle

¹ See *Cumming v. Chicago*, 33 | ² 42 N. J. L. 435.
N. E. R. 854.

of classification requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which will thus serve as a basis of classification must be of such a nature as will mark the object so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation, and the objects or places excluded. The marks of distinction upon which the classification is founded must be such, in the nature of things, as will, in some reasonable degree at least, account for or justify the restriction of the legislation."

Consequently, an act which authorized cities on the ocean to lay out streets and drives and walks on the beach or ocean front was held to be constitutional.¹ The court said :

"The cities of the State have been held to be a class by themselves for legislation (*Anderson v. Trenton*, 42 N. J. L. 486), and they may be subdivided by important characteristics, to which the purpose of the law relates, provided they embrace all those so characterized. Thus it is said in the former case above cited, from which this phrase has been taken by way of illustration, that a statute giving to all cities bordering on tide-water the power to construct docks or establish quarantine regulations would be valid. . . . So in this case these drives and walks are to be laid on lands covered by tides and water, and are peculiar in structure because of their location.

"If this law were general so as to include all the cities of the State, only those situated on or near the ocean having a beach or ocean front could use it, showing that they are a class distinct from other cities and thus free from constitutional prohibition."

In the above case the act did not apply to the cities so classified by reason of population, but to a class peculiar because of their location. But an act which provided a different mode of levying taxes on boroughs, which were seaside boroughs, from the general mode, was held to be

¹ *State v. Wright*, 54 N. J. L. 130.

unconstitutional,¹ because the levying of a tax in a different mode bore no peculiar relationship to such boroughs so as to call for exclusive legislation.

In another case,² the court held an act which constituted a board of public works in cities of the second class having a population exceeding 50,000, of which there were but three cities, to be constitutional, because a city with a larger population required different machinery for municipal government than one having a smaller population.

The courts have also held that, though the act does not embrace all the cities to which its object would properly apply it is not therefore unconstitutional; it is sufficient if it bears a reasonable relationship to those selected.³

In another case,⁴ in the same State, where an act to authorize cities having a population exceeding 20,000 to fund their floating indebtedness was under judicial scrutiny, the court held the act to be unconstitutional because special, holding that the issue of bonds to pay a floating debt had no natural relation to the basis of classification—the population of a city. The author believes this decision to be erroneous, because a large municipal corporation has a greater floating debt than a smaller, and there is greater need to fund such a debt.

The constitutional prohibition is directed against the passage of local laws affecting the “internal affairs” of *towns* and counties. The word *town* is held to include cities, unless the intent is otherwise shown.⁵

The courts of this State hold an act which repealed a charter of a municipal corporation was not prohibited, as such an act does not regulate the internal affairs of a town.⁶

In this State, as in many others, although it has by statute classified its cities, counties and boroughs, it is

¹ State v. Philbrick, 49 N. J. L. 374. | L. 486. See, also, Classen v. Trenton, 48 N. J. L. 438.

² State v. Gibson, 55 N. J. L. 11.

³ State v. Mayor etc. Clayton, 24 Vr. 277; State v. Moore, 42 N. J. L. 208.

⁵ Van Riper v. Parsons, 11 Vr. 1.

⁶ Worthley v. Steen, 43 N. J. L. 542.

⁴ Anderson v. Trenton, 42 N. J.

not necessary that such classification be observed in the act, so long as the municipalities operated upon bear some peculiar relationship to the object of the act.¹

§ 307. In California the courts hold that in order to legislate for a part of the municipalities, the object of the act must be peculiar to the municipalities it operates upon.

In *People v. Henshaw*, 76 Cal. 442; 18 Pac. Rep. 413, the principle was recognized that cities containing a large population require different legislation from those composed of a few hundred inhabitants, and to so classify them that a general law applicable to separate classes will meet the necessities of the case, was a wise provision.² And a law which applies to one or more, but not to all of these classes, is not for that reason special legislation. The court in this case held an act which created a police court in cities having a population of 30,000 and less than 100,000 constitutional.

The court in another case³ held an act which permitted a county and a city therein, each having a population of 100,000, to consolidate, was local and special, as there was but one such county and city.

In Missouri the courts recognize the rule that the subject may be sub-divided, and that cities and towns may be classified.

In *State, Lionberger v. Tolls*,⁴ the court approved the doctrine laid down in *Wheeler v. Philadelphia*, *supra*, where it was held that "a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special.

In this State the court held an act which related to the appointment of notaries in cities having a population of

¹ *State v. Gibson*, 55 N. J. L. 11; Cal. 310. See, also, Const. art. 11, Van Riper v. Parson, 110 Vr. 1; § 6, and case *Darcy v. San Jose*, 38 State v. Borough of Clayton, 24 Vr. Pac. R. 500.
277; *State v. Scott*, 21 Ib. 585; ³ *Desmond v. Dunn*, 55 Cal. 242.
Randolph v. Wood, 20 Ib. 85; *In re* See, also, *Earle v. Board of Education*, 55 Cal. 489.
Ass. Passaic, 54 N. J. L. 156.

² See *Pritchert v. Stanislaus*, 73 ⁴ 71 Mo. 615.

100,000, and ousting certain notaries then in office, unconstitutional, as St. Louis was the only city having the population named, and it might as well have been named in the act.¹

§ 308. **In Wisconsin**, in the case of the L. L. Co. v. Brown, 73 Wis. 294, the court said of an act which applied to certain towns: "The act is as general as any other general act. It provides for the exercise of additional powers in all towns in which villages are situate having a given number of inhabitants. It is not subject to the criticism that, though general in form it is special in fact, as it is a matter of public notoriety, that there are, and have been, several towns in the State to which the act can be applied.

"To hold that this section of the constitution requires the Legislature to make all laws for the government of towns applicable to every town in the State, without any regard to the wealth, population or other peculiarities of such town, would be to hold a very large portion of the legislation on the subject of towns in this State unconstitutional and void.

"It is clear that the act in question is not a violation of the system of town government but part of the system, in order to adapt the system to the peculiar wants of certain towns in the State."

A law authorizing cities operating under special charters to issue bonds when needed to perfect their sewer system is not a "special law," within the prohibition of art. 4, sec. 31, of the constitution.²

And an act authorizing cities of over 3,000 inhabitants which are operating under special charters to issue bonds for the improvement of streets and parks is held not to be prohibited by the constitution and not a special law.³

§ 309. **In Minnesota**, in the case of State v. Cooley, 58 N. W. R. 150, it was held:

1. That the constitutional prohibition against special legislation on a subject does not prevent the Legislature

¹ Harris v. Herman, 75 Mo. 340.

² Johnson v. City of Milwaukee,
88 Wis. 383.

³ *Ib.*

from dividing it into classes and applying different rules to different classes.

2. But that the classification must be based upon substantial distinctions, which make one class so different from another, as to suggest the necessity of different legislation with respect to them, and that the characteristics which form the basis of classification must be germane to the purposes of the law ; that is, the legislation must be confined to matter peculiar to the class.

3. When the basis of classification is valid it is immaterial how many or how few members there are of the class ; how many or how few objects there are to which the law can apply.

The classification must be complete so that the law will apply to every member of the class or every object under the same conditions.

The character of the act, as general or special, depends on its substance and not on its form.

In this case the court held on re-argument an act of the Legislature entitled "An act to provide additional means for completing and furnishing the court house and city hall building now in process of erection in the city of Minneapolis, and to authorize the issue and sale of bonds therefor," approved April 8th, 1893, to be constitutional.

The court held that the characteristics forming the basis of the classification were germane to the purpose of the law ; that Minneapolis, although named in the act, was the only city with the characteristics which formed the basis of the classification ; that it alone had a municipal building under course of erection which required the aid extended by the act.

The court in the first instance held the act local and unconstitutional, but on re-argument held it to be general as to the class.

The case is certainly as near the border line as any reported one ; even the city is named ; yet that city alone had the characteristics which formed the basis of the classification.

The Supreme Court of this State, in *Nichols v. Walter*,¹

approved the rule laid down in New Jersey and said: "The principle adopted by the Supreme Court of New Jersey comes more nearly to what we regard the true principle of classification than that stated by any other court," and then quotes with approval the language of the Chief Justice of that State in *State v. Hammer*, *supra*.

§ 310. **Other provisions prohibiting special legislation.**—Some of the State constitutions contain a prohibition in the following language: "In all cases where a general law can be made applicable no special law shall be enacted."¹ In Minnesota the same provision is found, but in addition it provides that whether a general law could have been made applicable in any case is a judicial question to be decided by the courts.

This provision is one for the Legislature and not for the courts to decide, and is held to be directory and not mandatory. Such seems to be the general rule of most of the state courts where the prohibition is found.²

§ 311. **In Indiana** it is the settled rule that it is for the Legislature, and not for the courts, to determine whether an act is in violation of sec. 23, art. 4, of the constitution of that State, which provides that where a general law can be passed, it shall be general and operate uniformly throughout the State.³

This was so also in Missouri under the late constitution, sec. 27, art 4.⁴

§ 312. **In Iowa**, the constitution, sec. 30, art. 3, provides that no special or local law shall be passed where a general law can be made applicable. It is held that the courts will only declare an act unconstitutional for this reason, when it is clearly, palpably and plainly inconsistent with this section of the constitution.⁵

¹ In constitutions of Alabama, California, Illinois, Indiana, Kansas, Missouri, Texas, North Dakota.

² *Edwards v. Herbrandson*, (N. D.) 50 N. W. R. 970; *State v. Boone Co.*, 50 Mo. 317; *Wiley v. Blaffton*, 111 Ind. 152; *People v. Allen*, 42 N. Y. 378; *Edmonds v. Herbrandson*, (N. D.) 50 N. W. R. 970; *Dill on Mun. Corp.* (4th ed.) § 48; *con-*

tra, *Pritz in re*, 9 Iowa, 30; *Van Phul v. Hammer*, 29 Iowa, 222.

³ *Evansville v. State*, 118 Ind. 426; *Wiley v. Corporation*, 111 Ind. 152.

⁴ *St. Louis v. Shields*, 62 Mo. 247.

⁵ *Morrison v. Springer*, 15 Iowa, 304; *Richman v. Board of Super.*, 77 Iowa, 513; *Van Phul v. Hammer*, 29 Iowa, 222.

§ 313. In Colorado, where the same prohibition is found, the court, in *Carpenter v. People*, 8 Colo. 426, said: "While it is not to be presumed that a co-ordinate branch of the State government invested with duties and powers indicated, and acting under oaths binding upon the consciences of the members, would act in bad faith, yet in the event of such wrongful action clearly appearing, it would become the duty of the courts to interfere. Every question of doubt in such an event would be properly resolved in favor of the validity of the act challenged."

And the courts of this State have, in a number of cases, recognized that the question is a judicial one, and have declared acts special in form and object to be unconstitutional because a general act would be applicable.¹

§ 314. **Conclusions**—What the author believes to be a general act.—It is impossible, in a work of this nature, to refer separately to the prohibitions against special legislation contained in all the State constitutions, or to the cases decided in all the States. Those referred to give a general idea of the constitutional prohibitions against local and class legislation in reference to municipalities, and will be found to cover such prohibitions contained in the constitutions of the different States.

We think we can safely say that an act will be considered as general in all the States, although it applies, when enacted, but to one or more municipalities, if the object of the act is peculiar to those municipalities, as distinguished from all the other municipalities, and the act is broad enough in its scope to permit all the excluded municipalities, when they in turn become invested with the peculiar characteristics, to partake of the benefits of the act so that the object of the act will then operate on them.

It must be remembered that the construction placed

¹ *In re Extension of Boundaries of Denver*, 32 Pac. R. 615; *In re Senate Bill*, 293; 39 Pac. R. 522.

upon these prohibitions by the courts of last resort of each State is the law, and as such is followed by the Federal courts.

Therefore the decisions of each State must be examined to ascertain the position of the courts as to what constitutes a general or a special law in each State; what is prohibited, what is allowed, what a law must embrace to be general, and what makes it special.

We refer the reader to a few of the many cases of the State courts on the subject.¹

§ 315. **Introduction of bills.**—Any member of either house may introduce a bill providing for the issue of municipal bonds or other paper, unless the constitution of the State requires that all bills for revenue, or relating to financial matters, be introduced in the lower house, and this he may do at any time, unless the constitution or some general law, or the rules of the house, require that bills be introduced within a certain number of days after the commencement of the session, or prohibits the introduction of bills within a certain number of days prior to the close of the session.² It has been the practice, in

¹ In the following cases the acts were declared to be special: *Ger. A. Ins. Co. v. Youngston*, 68 Fed. Rep. 452; *Murane v. St. Louis*, 27 S. W. R. 711, or 123 Mo. 479; *Parker v. Common Council*, (N. J.) 30 Atl. R. 186; *Copeland v. St. Joseph*, (Mo.) 29 S. W. R. 281; *City of Kenton v. State*, (Ohio) 38 N. E. R. 885; *In re Extension of Boundaries of Denver*, 32 P. R. 615; *Welsh v. Bramlet*, (Cal.) 33 P. R. 66; *Pittsburgh v. Hughes*, 13 Pa. Co. Ct. R. 535; *Alexander v. Duluth*, (Minn.) 58 N. W. R. 866; *Goldberg v. Dorland*, (N. J.) 29 Atl. R. 599; *State v. Ill. Cent. R. R.*, 33 Fed. Rep. 730; *McCarthy v. Com.*, 110 Pa. 243; *State v. Boyd*, 19 Nev. 43.

In the following cases the acts were declared to be general: *State v. Cincinnati*, 8 Ohio Cir. Ct. R.

523; *Wadena v. Wiswell*, 63 N. W. R. 1103; *Brady v. Moulton*, 63 N. W. R. 489; *Spaulding v. Brady*, (Mo.) 31 S. W. R. 103; *People v. Warden*, 81 Hun, 434; *State v. Nelson*, (Ohio) 39 N. E. R. 22; *Revell v. Annapolis*, (Md.) 31 Atl. R. 695; *Johnson v. Milwaukee*, 88 Wis. 383; *Arthur v. Glens Falls*, 21 N. Y. S. 81; *Cummings v. Chicago*, 33 N. E. R. 804; *Reeves v. Cont. R. W. Co.*, 152 Pa. St. 153; *Swikehard v. Michels*, 29 N. Y. S. 777; *McClay v. City of Lincoln*, (Neb.) 49 N. W. R. 282; *Reed v. Maxfield*, (Ohio) 32 Mixly Law Bul. 50; *Owen v. Sioux City*, (Iowa) 59 N. W. R. 3; *In re Elizabeth Comrs.*, (N. J.) 49 N. J. L. 488; *Little Rock Co. v. Hanniford*, 49 Ark. 291.

² In Michigan no new bill can be introduced after the first fifty days

order to attempt to evade these limitations, to introduce within the time bills with no intention of passing, so that later, and after the time for introduction of bills has elapsed, a member, if he desires to introduce and pass some act, may amend the bill introduced within the time, by striking out all but its title and enacting clause, and inserting the desired legislation, and afterwards amending the title to correspond with the body of the bill. This mode of attempting to evade the constitution has been denounced by the courts, and they hold all such legislation unconstitutional, unless the new matter is of the same general purpose and subject-matter as the original bill. It must, in fact, be a proper amendment on the same subject-matter indicated by the original title of the act.¹

§ 316. **Readings.**—Many of the State constitutions require that a bill be read a certain number of times, usually three, as in Ohio, where the constitution requires that “every bill shall be fully and distinctly read on three different days, unless in case of urgency three-fourths of the house in which it shall be pending shall dispense with this rule, or read a certain number of times, as in New Jersey, where the constitution requires that “all bills and joint resolutions shall be read three times in each house before final passage thereof.”

The manner of reading, whether of the whole bill or only its title, seems to be left to the discretion of the respective houses of the Legislature.

The courts will not interfere as to the manner of the reading,² but it must be read, and the constitution in this respect must be obeyed, otherwise the act will be declared to be unconstitutional,³ in those States wherein the proceedings of the Legislature relative to the passage of laws may be inquired into. (This subject is discussed in the latter part of this chapter.)

of the session. In Maryland within ² *People v. McElroy*, 72 Mich. 146;
the last ten days. In Arkansas *Weill v. Cantfield*, 51 Cal. 111.
within the last three. ³ *People v. Starne*, 35 Ill. 121;

¹ *Sackrider v. Board of Sup. Sage-Weill v. Kentfield*, 51 Cal. 111.
inaw Co., 79 Mich. 59; *Pack v.*
Barton, 47 Mich. 520.

Where the constitution excuses the reading of a bill on several days, or a certain number of times before final passage in cases of urgency, it is for the Legislature to determine when the urgency arises, and the courts will not inquire into the question.¹

§ 317. **Vote.**—The constitutions of the respective States contain provisions respecting the number of votes required in each house to finally pass a bill.

The number so required differs in the various States. Sometimes the number is a majority of those present and voting, provided they constitute a quorum.

In other States a majority of all the members of each house is required. In several States a majority of two-thirds or three-fourths is required.

It is imperative that each bill receive the number of votes required by the constitution of the State, otherwise it will be held to be unconstitutional in those States wherein an act is but *prima facie* evidence of its constitutional enactment.² A number of the State constitutions require that the ayes and nays shall be taken and recorded on the final passage of each bill.

This provision is intended to require the constitutional number of votes on each bill to be taken and the same recorded, and in addition to this it fixes the responsibility for the passage of the act upon each member voting for it. The usual manner is to call the roll of the house, and the members present then vote either aye or nay, and their vote is then recorded on its passage. This provision of the constitution is mandatory and must be strictly followed, and unless the bill receive the requisite number of votes as shown by the journal it will be declared to be for this reason unconstitutional,³ except in those States where the proceedings of the Legislature cannot be inquired into by the courts.

§ 318. **Signing of bills by presiding officers.**—The bills are usually signed by the presiding officers of each

¹ Weyand v. Stoner, 35 Kan. 545; Hull v. Miller, 4 Neb. 503.

² Amoskeag Nat. Bank v. Ottawa, 105 U. S. 667.

³ Ames v. Union P. R. R. Co., 64 Fed. Rep. 165; Ryan v. Lynch, 68 Ill. 160; People v. Com. of Highways, 54 N. Y. 276.

of the respective houses after they have passed the house over which they preside. Unless the constitution of the State requires a bill to be so signed it is not invalid if not signed;¹ but where the constitution requires a bill to be so signed it is invalid, unless signed,² even in those States where an act is conclusively presumed to be regularly passed.³

The cases which hold an act to be conclusive evidence of regularity expressly state that it is declared to be such because regularly signed by the presiding officers.⁴

§ 319. **Signing by governor.**—The constitutions of the different States usually require that the bill after it has passed the Legislature be presented to the governor for his approval, and he must either approve the bill or return it to the house from which it originated with his objections, and the house may then reconsider it and pass it over his objections. As this is a constitutional requirement, the constitution of each State must be resorted to in order to ascertain the mode of procedure.

When the governor is allowed a certain number of days prior to adjournment for action, Sundays are usually excepted,⁵ and the days are to be full days of twenty-four hours.⁶

Some of the State constitutions provide that if the governor does not sign the bill, or does not return it with his objections to the house in which it originated within a certain number of days, the bill, as presented to him, shall become a law without his signature, unless the legislative adjournment within that time prevents its return, in which case it shall not be a law.

It is held under this provision that an adjournment does not prevent the bill from becoming a law if it be signed by the governor, but the only effect of such ad-

¹ *Speer v. Plank R. Co.*, 22 Pa. St. 376; *Pelt v. Payne*, (Ark.) 30 S. W. R. 426.

² *Cooley on Const. Lim.* 183, and cases cited.

³ *McLane v. Paschel*, 28 S. W. R.

711.

⁴ *Carr v. Coke*, N. C. 22 S. L. R. 16.

⁵ *Stinson v. Smith*, 8 Minn. 366.

⁶ *In re Senate Resolution*, 21 P. R. 475.

jourment is to prevent it becoming a law merely by failure of the governor to sign it.¹

In New Jersey, where the constitution provides that "if any bill shall not be returned by the governor within five days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Legislature by their adjournment prevents its return, in which case it shall not be a law," the governor may sign the bill any time after the adjournment of the Legislature, but he cannot file it without his signature, so that it will be operative.

The governor must approve the bill before the Legislature adjourns,² unless, as is the case in a number of the States, the constitution gives him further time so to do.

It has been held in Georgia³ the governor may, as had been the custom for a long time, approve and sign bills after the adjournment of the Legislature, although the constitution did not enlarge the time so to do.

After a bill has been returned by the governor with his objections, and has been reconsidered and passed over his veto, it is not necessary that it be again signed by the presiding officers, or again presented to the governor unless so required by the constitution.⁴

In some of the States the constitution provides that in case of an adjournment a bill shall become a law, unless the governor shall, within a certain number of days, file such bill with his objections with the secretary of state.⁵

Under the constitution of New York, which provides that a bill shall not become a law unless the governor shall sign or return it within ten days, unless the Legislature by adjournment prevented its return, it was held the governor could sign the bill any time within the ten days after final adjournment.⁶

¹ *People v. Bowen*, 30 Barb. 24; ⁴ *Evansville v. The State*, 118 Ind. 456.

Seven Hickory v. Ellery, 103 U. S. 423; *Burn v. Sewell*, (Minn.) 51 N. W. R. 224. ⁵ Const. of Indiana, art. 5, § 14; *Stalcup v. Dixon*, 35 N. E. R. 987.

² *Cooley on Const. Lim.* 185.

⁶ *Hequembourg v. Dunkirk*, 56

³ *Solomon v. Cartersville*, 41 Ga. 157. N. Y. 550; *People v. Bowen*, 30 Barb. 24. See, also, *Lankford v.*

Under art. 4, sec. 11, of the constitution of Minnesota, authorizing the governor to sign, within three days after the adjournment of the Legislature, any act passed during the last three days of the session, bills, though finally voted upon more than three days before the day of adjournment, if enrolled within the last three days, are to be deemed passed within that time, and may be signed by the governor,¹ and under this same provision it was held that the "last three days" means the days setting for business, and that, therefore, Sunday need not be counted.²

The day the bill is presented to the governor is usually excluded in the count.³ Where a governor by mistake signed a bill at the end of the first page instead of the foot of the bill, and discovering his mistake after the time for signing had elapsed, erased his first signature and again signed it at the bottom of the last page, the court held the original signing to be valid and effectual.⁴

Where the governor approved and filed a bill, and afterwards on the same day withdrew it and erased his signature and returned it with a veto message to the Legislature, it was held the bill never became a law.⁵

Where a Legislature adjourned before omissions in an act were discovered, and the presiding officer signed it free from such omissions and as it should have read, and the governor then approved it, it was held a valid act.⁶

§ 320. **When statutes take effect.**—Statutes take effect from the time the constitutional requirements in relation to their passage have been complied with, unless the act itself or some general law or the constitution provides some other time.

The usual constitutional requirements are that it be

Comrs. Somerset Co., 20 Atl. R. 1017 or 73 Md. 105; Miller v. Hunsford, 11 Neb. 377.

¹ Burns v. Sewell, (Minn.) 51 N. W. R. 224.

² J. V. Farwell Co. v. Matheis, 48 Fed. Rep. 363.

³ Beaudeans v. Cape Girardeau, 71 Mo. 392.

⁴ Nat. Land etc. Co. v. Mead, 60 Vt. 257.

⁵ Weeks v. Smith, 18 Atl. R. 325.

⁶ Dow v. Beideman, 49 Ark. 325. On this subject see Cooley on Const. Lim. (6th ed.) 184, n.

signed by the presiding officers of the houses of the Legislature, then signed by the governor or filed by him ; when this is done it is a law ; or if returned to the Legislature with his objections and it is again passed, it then becomes a law. In some of the States it must be filed with a designated State officer before it becomes a law. And as we have seen most of the State constitutions provide that after a bill shall remain in the governor's hands for a certain number of days and he does not return it, it becomes a law as if he had signed it. The time of its taking effect, it would seem, would be in such a case from the time of its final passage.

Some of the constitutions contain what is known as an emergency clause, which requires that in order that an act take effect prior to the time acts generally shall take effect, the act shall state the time it shall go into effect and also the emergency.¹ Some of the States, by general laws, have provided that unless an act expressly state that it shall go into effect immediately, it shall take effect on a certain subsequent day, as in New Jersey, where the statute² provides that, unless an act otherwise provides, it shall take effect on July 4th next after passage.

Where an act passed May 16th, 1894, declared that it should take effect May 14th, 1894, it was held it went into effect on its passage.³

In New York it is held that an act does not take effect until the day after approval, since it cannot relate back to time before its approval.⁴

In Wisconsin, where the constitution, art. 7, sec. 21, provided that "no general law shall be in force until published," the court, in *Clark v. City of Janesville*, 10 Wis. 136, held that the term "a general law" meant a public act, and that the charter of the city was a general law, and as it had issued bonds before its charter had been published, the bonds were void. The court said :

¹ Const. of Illinois, art. 3, § 23 ; Const. of Texas, art. 3, § 39 ; *Jame-*

son v. State, 24 S. W. R. 508.

² Rev. Statutes, p. 1122.

³ *McLaughlin v. Newark*, (N. J.) 30 Atl. 543.

⁴ *In re Foley*, 28 N. Y. S. 608. See p. 421, n. 5, as to when special city acts take effect in New York.

“The object of the provision was the protection of the people, by preventing their rights and interest from being affected by laws which they had no means of knowing.”

As before said, the time when an act takes effect is regulated by the State constitution or some general law on the subject. If not found in these, the act takes effect after all the formalities have been complied with, or such subsequent time as may be designated in the act itself.¹

§ 321. **May the proceedings of the Legislature be inquired into?**—Even the laws as found upon the statute books of many of the States are open to investigation, and if upon inspection it is found that the Legislature failed to follow the requirements of the State constitution, as the calling and recording of the ayes and nays upon the passage of the act, or where the bill was not read the required number of times, or did not receive the required number of votes, or other constitutional requirements were not followed by the Legislature, or some of its branches, the act will be declared to be void and no law at all,² and the bonds issued under such an act will be void in all hands, and the doctrine of estoppel does not apply.³

The question whether, after an act has been passed by the Legislature and filed in the office of the secretary of state or other proper officer, and is to all appearances on its face a lawful act, the proceedings of the Legislature may be inquired into and the act shown to be unconstitutional because some constitutional requirement has not been complied with in its passage, is still unsettled.

Some of the State courts hold that an act of the Legislature is but *prima facie* evidence of compliance with the constitutional requirements, while others hold that the act is conclusive upon the courts and the proceedings of the Legislature cannot be investigated.

One of the earliest cases which held that an act of the

¹ See Cooley on Constitutional Limitations, page 190 *et seq.*, for a further discussion of the subject.

ple v. Supervisors of Chenango, 8 N. Y. 317.

² Town of South Ottawa v. Perkins, 94 U. S. 260.

³ Cooley on Const. Lim. 141; Peo-

Legislature is the presumptive evidence of its legal passage is that of *Miller and Paddock v. Goodwin*, 7 *Chicago Legal News*, 294, and was upon an application to restrain the tax-collector from collecting a tax to pay the interest on bonds.

It was shown that the journal of the Senate did not show that the bill had ever passed the Senate. The court said: "The bill never became a law and the pretended act conferred no power. It follows that the bonds were not merely voidable, but that they were absolutely void for want of power or authority to issue them, and consequently no subsequent act or recognition of their validity could so far give vitality to them as to stop the taxpayers from denying their legality."

In the same State, in another case, the right to inquire into the proceedings was again asserted.¹ In a number of other States the right of a court to inquire into the proceedings of the Legislature, with the view of ascertaining whether the act, as filed with the secretary of state, was passed in the manner required by the State constitution, has been decided in the affirmative.²

It must, however, be admitted that the reason, as well as the weight, of the recent decisions of many of the State courts³ are to the effect that an enrolled bill on file in the office of the secretary of state or other proper officer, in all respects regular on its face and bearing the signatures of the officers of the houses of the Legislature, and bearing the signature of the governor, or which becomes a law without his signature,⁴ is conclusively presumed to have been regularly passed, and the proceedings of

¹ *People v. Starne*, 35 Ill. 121.

³ *State v. Jones*, 34 P. R. 201;

² *State v. Price*, 8 Ohio C. C. R. 25; *Tall v. Jerome*, (Mich.) 59 N. W. R. 816; *Ellis v. Ellis*, (Minn.) 56 N. W. R. 1056; *Thomas v. Dakin*, 22 Wend. 9; *State v. McBride*, 1 Mo. 303; *State v. Maffit*, 5 Ohio, 223; *Debow v. The People*, 1 Denio, 9; *Mass. M. L. Ins. Co. v. Colo. L. Co.*, 36 Pac. Rep. 793; *People v. Galena Co.*, (Cal.) 35 Pac. R. 302.

⁴ *Honey v. State*, 119 Ind. 395.

the branches of the Legislature cannot be offered in evidence to show that such act was not regularly passed as required by the constitution.

Chief Justice Beasley, of New Jersey, in *Pangborn v. Joving*,¹ after an exhaustive examination of the subject, said: "My conclusion then is that both upon the ground of public policy and upon the ancient and well settled rules of law, the copy of a bill attested in the manner mentioned (by the speaker of each house according to legislative practice and signed by the governor) and filed in the office of the secretary of state, is the conclusive proof of the enactment and contents of a statute of this State, and that such attested copy cannot be contradicted by the legislative journals or in any other mode."

In a case in Pennsylvania,² where the court held the act to be conclusive upon the courts, the court well said: "If every law could be contested on the ground of informality in its enactment, the flood-gates of litigation would be opened so widely, that society would be deluged in the flood."

§ 322. **Same—Prior publication.**—In some of the States the constitution requires that notice of certain proposed legislation be published for a designated number of days. The courts, even in those States where an act properly authenticated and filed is held conclusive as to regularity, are not uniform in holding that such publication will be conclusively presumed by the authentication and filing of the act. In Pennsylvania³ it is held that it will be so presumed, while in New Jersey⁴ it is open to inquiry, while in another State the recital in the act that it was properly published cannot be contradicted in the absence of fraud.⁵

The question whether or not the proceedings of the Legislature can be inquired into is most exhaustively treated, both by counsel and court, in the case of *Fields v. Clark*, 143 U. S. 649, where, in a note to be found

¹ 32 N. J. L. 29-41.

² *Kilgore v. Magee*, 85 Pa. 401.

³ *Perkin v. Philadelphia*, 27 Atl.

R. 356.

⁴ *Ewing Tp. v. Trenton*, 31 Atl. R. 223.

⁵ *State v. Murray*, (La. Ann.) 17 So. R. 832.

on page 661, *et seq.*, the attitude of the State courts on the question is given.

§ 323. **Same—Regularity, where presumed, but not conclusive.**—In the following States the bill is but *prima facie* evidence of regularity, viz.: Colorado, Arkansas, California, Dakota undecided, Florida, Illinois, Kansas, Kentucky undecided, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, Ohio, Oregon, South Carolina, Tennessee, Virginia, West Virginia, Wisconsin, Wyoming. The reader is referred to the note to the case of *Field v. Clark*, *supra*, where he will find the position of the respective States on this subject defined, with references to the decided cases.

The Supreme Court in the latter case held that the signing by the Speaker of the House of Representatives and by the President of Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such a bill, and that when such a bill receives the approval of the President and is deposited in the Department of State according to law, its authentication as a bill that has passed Congress is complete and unimpeachable.

The Federal courts will be controlled by the decisions of the highest State courts on this subject, because it is a question relating to the construction of a State constitution.¹

§ 324. **The presumption is that a statute is constitutional.**—The laws as found upon the statute books are presumed by the courts to be valid, even in those States where the completed act is not regarded as conclusive. And where the house journal did not show that certain amendments made by the Senate to a house bill were printed prior to their adoption by the house, as required by the State constitution, it was presumed that they were so printed.²

In the absence of positive proof to the contrary, it is

¹ *Field v. Clark*, 143 U. S. 649—² *State v. Field*, (Mo.) 24 S. W. R. 679; *South Ottawa v. Perkins*, 94

U. S. 260; *Post v. Supervisors*, 105 U. S. 667.

presumed that all the requirements of the constitution have been complied with by the branches of the Legislature in the passage of bills.¹ In New York it has been held that unless the defect was apparent upon the face of the enabling act, the fact that it was not passed by the Legislature as required by the constitution could not be set up as a defence, unless such failure was set up in the pleadings.²

§ 325. **Construction of constitutional provisions.**—The courts hold, with reluctance, statutes to be unconstitutional. They presume that the Legislature, a co-ordinate branch of the State government, is desirous of obeying the wishes of the people as expressed in their constitutions, and therefore it is a general rule of the courts to seek to sustain, rather than break down, the acts of the Legislature.

Therefore a statute will not be declared to be unconstitutional, unless a clear and substantial conflict exists between it and the constitution.³ And it will be presumed to be valid and constitutional until the contrary is shown;⁴ but when it is clearly shown that the statute is unconstitutional, that it is repugnant to some provisions of the constitution, the courts will not hesitate to set it aside.

When an act is susceptible of two constructions, one of which will maintain and the other destroy it, the former will be adopted.⁵ In construing a statute claimed to be in conflict with the constitutional provisions relative to its form and scope, the courts will hold, as constitutional, all that part of the statute in harmony with the constitution, and only hold the balance invalid, provided the parts are not so connected together that the valid cannot stand without the invalid. In other words, so anxious are the courts to presume that the Legislature intended to pass only constitutional laws, and yet recog-

¹ *Ellis v. Ellis*, 56 N. W. R. 1056; ² *People v. Super. of Chenango* Mass. M. L. Ins. Co. v. Colo. L. & Co., 8 N. Y. 317.

T. Co., 36 Pac. R. 791; *People v.* ³ *People v. Gillson*, 109 N. Y. 397.

Dunn, 80 Cal. 211; *Glidewell v.* ⁴ *Thompson v. Webster*, 69 N. Y. 149
Martin, 51 Ark. 559; *Hall v. Steele*, ⁵ *Dugger v. M. & T. Ins. Co.*, 32
82 Ala. 562. S. W. R. 5.

nizing the superior will of the people expressed through their constitution, the courts will, if the good can be separated from the bad, permit the former to stand while rejecting the latter.¹

The construction of the United States Supreme Court of the constitution of the United States is binding upon all State courts,² and where the Supreme Court decides that a statute of the State violates the Federal constitution it must be followed by the State courts.³

The remarks of the author relative to the constitutional provisions relating to the enactment of laws having extended already beyond the purpose of the present work, it is dismissed with the remark that every act of a State Legislature in this regard should be carefully scrutinized to ascertain whether or not it conflicts with the constitution of such State in form or substance, and the decisions of the courts of the State on the subject, which are the judicial constructions of such constitutions, should be weighed with care and applied to the law in question, in order to ascertain if the law is constitutional or not. Often, then, it requires fine judgment, a logical mind, to arrive at a proper conclusion.

The reader is referred to the works devoted exclusively to the subject for further reference.⁴

¹ *Payne v. School Dist.*, 168 Pa. 386; *Coxe v. State*, 144 N. Y. 396; *City of Beverly v. Wahn*, (N. J.) 30 Atl. R. 543; *Ritchie v. People*, (Ill.) 40 N. E. R. 451; *Steele v. Backer*, (Mo.) 31 S. W. R. 924; *Com. v. Wier*, 15 Pa. Co. Ct. R. 425; *People v. Supt.*, 148 Ill. 413; *Cutin v. Bartin*, 139 N. Y. 505.

In *Mayor etc. v. Dechert*, 32 Md. 369, the court held a statute which conferred upon the mayor all the powers of a justice of the peace void, so far as it invested him with judicial functions, but good so far as it conferred upon him police powers, although both powers were conferred by the same section.

In *Railroad Co. v. Schulte*, 103 U. S. 118, it was held that a part of

an act which conferred powers to execute bonds and exchange them in aid of a railroad was constitutional, and that another part of an act which gave a lien on the property of a railroad company to secure such bonds was unconstitutional. The courts, when the statute relates to civil matters, seek to sustain all that can be separated from the bad, while if the statute relates to criminal matters, a much more stringent rule is adopted. *Wynelhauser v. People*, 13 N. Y. 398.

² *Larrabee v. Talbott*, 46 Am. Dec. 637.

³ *Brigham v. Henderson*, 48 Am. Dec. 610.

⁴ *Cooley on Const. Lim.*; *Sedgwick on Const. of State & Constitu-*

§ 326. **Judicial notice.**—It may be proper in this connection to show in a general way of what facts relative to municipalities a court will take judicial notice.

Courts take judicial notice of the population of cities and towns as shown by the last preceding census.¹

And where an act by its terms was made applicable to all towns and cities contiguous to any city of 100,000 or more inhabitants, the court took judicial notice that there was only one city in the State with such a population, and that there was no probability that any other city would come within its terms for many years.²

The courts will take judicial notice of the incorporation of a city or town;³ and in a case where it was averred that the city was incorporated it was held that it need not be proved.⁴

But it has been held that a court would not take judicial notice of the fact that a county was incorporated on a certain day,⁵ or that a township was incorporated under a general act which provided for an election to be held as to whether it should be incorporated or not.⁶

A court will take notice of geographical facts, as that a city is situated in a certain county,⁷ or that it is located a certain distance from another city or some designated point.⁸

The court will also take judicial notice that a city or town belongs to a certain grade or class under some general act classifying them.

The United States courts take judicial notice of State statutes and they need not be proved.⁹

tional Law; Black on Constitutional Law.

¹ State v. Brskamp, (Iowa) 51 N. W. R. 532; Hawkins v. Thomas, 3 Ind. App. 399; State v. Marion Co., (Mo.) 31 S. W. R. 33.

² *In re* Senate Bill, 293, (Colo.) 39 Pac. R. 522.

³ Jones v. Lake View, 151 Ill. 663; Penn. Co. v. Horton, 112 Ind. 189; Burfenning v. Chicago R. Co., 48 N. W. R. 441.

⁴ Pasadena v. Stinson, (Cal.) 27 P. R. 604.

⁵ Trinbull v. Edwards, 19 S. W. R. 772; *contra*, Ellsworth v. Nelson, (Iowa) 46 N. W. R. 749.

⁶ Rousey v. Wood, 47 Mo. App. 465.

⁷ Lewis v. State, 24 S. W. R. 903.

⁸ M. B. L. Ins. Co. v. Robinson, 58 Fed. Rep. 723.

⁹ Mer. Ex. Bk. v. McGraw, 59 Fed. Rep. 927.

CHAPTER XIX.

ABSTRACTS FROM THE RESPECTIVE CONSTITUTIONS RELATIVE TO THE INCURRING OF DEBT.

SECTION.

327—Alabama.
328—Arkansas.
329—California.
330—Colorado.
331—Connecticut.
332—Delaware.
333—Florida.
334—Georgia.
335—Idaho.
336—Illinois.
337—Indiana.
338—Iowa.
339—Kentucky.
340—Louisiana.
341—Maine.
342—Maryland.
343—Massachusetts.
344—Michigan.
345—Minnesota.
346—Mississippi.
347—Missouri.
348—Montana.

SECTION.

349—Nebraska.
350—Nevada.
351—New Hampshire.
352—New Jersey.
353—New York.
354—North Carolina.
355—North Dakota.
356—Ohio.
357—Oregon.
358—Pennsylvania.
359—Rhode Island.
360—South Carolina.
361—South Dakota.
362—Tennessee.
363—Territories.
364—Texas.
365—Vermont.
366—Virginia.
367—Washington.
368—West Virginia.
369—Wisconsin.
370—Wyoming.

§ 327. ALABAMA.

Constitution adopted December 6, A. D. 1875. See Code of Alabama, Civil, Vol. 1, 1886, and Session Laws, 1886, 1888 and 1890.

CONSTITUTIONAL LIMITATION.—ARTICLE XI.—TAXATION.

Sec. 3. "After the ratification of this constitution, no new debt shall be created against, or incurred by, this State, or by its authority, except to repel invasion or suppress insurrection, and then only by a concurrence of two-thirds of the members of each house of the General Assembly, and the vote shall be taken by yeas and nays and entered on the journals; and any act creating or

incurring any new debt against this State, except as herein provided for, shall be absolutely void ; *Provided*, The Governor may be authorized to negotiate temporary loans, never to exceed one hundred thousand dollars, to meet deficiencies in the treasury ; and until the same is paid, no new loan shall be negotiated ; *Provided, further*, That this section shall not be so construed as to prevent the issuance of bonds in adjustment of existing State indebtedness." (Civil Code, Vol. 1, p. 43.)

The constitution also prohibits the State from donating money to any charitable or educational institution not under its absolute control, unless authorized by a two-thirds vote of all the members elected to the Legislature (Sec. 3, Art. IV.) ; it cannot loan money nor credit for, nor engage in, works of internal improvement. (Sec. 54, Art. IV.) The State, counties, cities, etc., shall not grant or loan money nor credit for any private or corporate enterprise ; nor become a stockholder therein. (Secs. 54, 55, Art. IV.) There are no other constitutional limitations for the State, county, city, town or school district.

§ 328. ARKANSAS.

CONSTITUTION.—ARTICLE XII.—MUNICIPAL AND PRIVATE CORPORATIONS.

Sec. 3. "The General Assembly shall provide by general laws for the organization of cities (which may be classified) and incorporated towns, and restrict their power of taxation, assessment, borrowing money and contracting debts so as to prevent the abuse of such power."

Sec. 4. "No municipal corporation shall be authorized to pass any laws contrary to the general laws of the State, nor levy any tax on real and personal property to a greater extent in one year than five mills on the dollar of the assessed value of the same ; *Provided*, That to pay indebtedness existing at the time of the adoption of this constitution, an additional tax of not more than five mills on the dollar may be levied.

ARTICLE XVI.—FINANCE AND TAXATION.

Sec. 1. "Neither the State, nor any city, county, town

or other municipality in this State shall ever loan its credit for any purpose whatever ; nor shall any county, city, town or other municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure payment of the present existing indebtedness, and the State shall never issue any interest-bearing treasury warrants or scrip."

§ 329. *CALIFORNIA.*

Constitution in operation July 4th, A. D. 1879. (See "Deering's Annotated Codes and Statutes," Vols. 1 (1886) and 5 (1889) and Statutes and Amendments to the Code, 1891.)

CONSTITUTIONAL LIMITATIONS.—ARTICLE XI.—CITIES, COUNTIES AND TOWNS—RESTRICTION UPON COUNTY AND MUNICIPAL INDEBTEDNESS.

Sec. 18. "No county, city, town, township, board of education or school district shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof within twenty years, or before maturity, which shall not exceed forty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void." (As amended Feb. 25, 1891. State of California, 1891, p. 524.)

ARTICLE XVI.—STATE INDEBTEDNESS.—RESTRICTION ON LEGISLATIVE POWERS.

Sec. 1. "The Legislature shall not, in any manner,

create any debt or debts, liability or liabilities, which shall singly, or in the aggregate, with any previous debts or liabilities, exceed the sum of three hundred thousand dollars, except in case of war, to repel invasion or to suppress insurrection, unless the same shall be authorized by law for some single object or work to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within twenty years of the time of the contracting thereof, and shall be irrevocable until the principal and interest thereon shall be paid and discharged; but no such law shall take effect until, at a general election, it shall have been submitted to the people, and shall have received a majority of all the votes cast for and against it at such election; and all moneys raised by authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt thereby created; and such law shall be published in at least one newspaper in each county, or city and county, if one be published therein, throughout the State, for three months next preceding the election at which it is submitted to the people. The Legislature may, at any time after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same." (Deering, Vol. 1, pp. 66, 67.)

§ 330. *COLORADO.*

CONSTITUTION.—ARTICLE XI.—PUBLIC INDEBTEDNESS.

Sec. 3. "The State shall not contract any debt by loan in any form except to provide for casual deficiencies of revenue, erect public buildings for use of the State, suppress insurrection, defend the State, or, in time of war, assist in defending the United States; and the amount of the debt contracted in any one year to provide for deficiencies of revenue shall not exceed one fourth of a mill on each dollar of valuation of taxable property within the State, and the aggregate amount of such debt

shall not at any time exceed three-fourths of a mill on each dollar of said valuation, until the valuation shall equal one hundred millions of dollars, and thereafter such debt shall not exceed one hundred thousand dollars, and the debt incurred in any one year for erection of public buildings shall not exceed one-half mill on each dollar of said valuation, and the aggregate amount of such debt shall never at any time exceed the sum of fifty thousand dollars (except as provided in section five of this article), and in all cases the valuation in this section mentioned shall be that of the assessment last preceding the creation of said debt."

Sec. 4. "In no case shall any debt above mentioned in this article be created except by a law which shall be irrevocable until the indebtedness therein provided for shall have been fully paid or discharged ; such law shall specify the purposes to which the funds so raised shall be applied, and provide for the levy of a tax sufficient to pay the interest on, and extinguish the principal of such debt within the time limited by such law for the payment thereof, which in the case of debts contracted for the erection of public buildings and supplying deficiencies of revenue, shall not be less than ten nor more than fifteen years, and the funds arising from the collection of any such tax shall not be applied to any other purpose than that provided in the law levying the same ; and when the debt thereby created shall be paid or discharged, such tax shall cease, and the balance, if any, to the credit of the fund shall immediately be placed to the credit of the general fund of the State."

Sec. 5. "A debt for the purpose of erecting public buildings may be created by law, as provided for in section four of this article, not exceeding in the aggregate three mills on each dollar of said valuation ; *Provided*, That before going into effect such law shall be ratified by the vote of a majority of such qualified electors of the State as shall vote thereon at a general election, under such regulations as the General Assembly may prescribe."

Sec. 6. "No county shall contract any debt by loan in

any form except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges ; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to-wit : Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof : counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof, and the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt : but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned : provided, that any county in this State which has an indebtedness outstanding either in the form of warrants issued for purposes provided by law prior to December 31, A. D. 1886, or in the form of funding bonds issued prior to such date for such warrants previously outstanding, or in the form of public building, road or bridge bonds outstanding at such date, may contract a debt by loan, by the issuance of bonds for the purpose of liquidating such indebtedness, provided the question of issuing said bonds shall, at a general or special election called for that purpose, be submitted to the vote of such of the duly qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed in such county, and the majority of those voting thereon shall vote in favor of issuing the bonds. Such election shall be held in the manner prescribed by the laws of

this State for the issuance of road, bridge and public building bonds, and the bonds authorized at such election shall be issued and provision made for their redemption in the same manner as provided in said law." (As amended November 6, 1888.)

Sec. 7. "No debt by loan in any form shall be contracted by any school district for the purpose of erecting and furnishing school buildings, or purchasing grounds, unless the proposition to create such debt shall first be submitted to such qualified electors of the district as shall have paid a school tax therein in the year next preceding such election and a majority of those voting thereon shall vote in favor of incurring such debt."

Sec. 8. "No city or town shall contract any debt by loan in any form, except by means of an ordinance, which shall be irrevocable, until the indebtedness therein provided for shall have been fully paid or discharged; specifying the purposes to which the funds to be raised shall be applied, and providing for the levy of a tax, not exceeding twelve (12) mills on each dollar of valuation of taxable property within such town or city, sufficient to pay the annual interest and extinguish the principal of such debt within fifteen, but not less than ten years from the creation thereof; and such tax when collected shall be applied only to the purposes in such ordinance specified, until the indebtedness shall be paid or discharged. But no such debt shall be created unless the question of incurring the same shall, at a regular election for councilmen, aldermen or officers of such city or town, be submitted to a vote of such qualified electors thereof as shall, in the year next preceding, have paid a property tax therein, and a majority of those voting on the question, by ballot deposited in a separate ballot-box, shall vote in favor of creating such debt; but the aggregate amount of debt so created, together with the debt existing at the time of such election, shall not at any time exceed three per cent of the valuation last aforesaid. Debts contracted for supplying water to such city or town are excepted from the operation of this section. The valuation in this section mentioned shall be in all

cases that of the assessment next preceding the last assessment before the adoption of such ordinance."

Sec. 9. "Nothing contained in this article shall be so construed as to either impair or add to the obligation of any debt heretofore contracted by any county, city, town, or school district, in accordance with the laws of Colorado territory, or prevent the contracting of any debt, or the issuing of bonds therefor, in accordance with said laws, upon any proposition for that purpose which may have been, according to said laws, submitted to a vote of the qualified electors of any county, city, town or school district, before the day on which this constitution takes effect."

§ 331. *CONNECTICUT.*

See general statutes, 1888, and session laws 1887, 1889 and 1891.

CONSTITUTIONAL LIMITATION.—ARTICLE XXV.

(Adopted as an amendment October, 1877.)

"No county, city, town, borough or other municipality shall ever subscribe to the capital stock of any railroad corporation, or become a purchaser of the bonds, or make donation to, or loan its credit, directly or indirectly, in aid of any such corporation; but nothing herein contained shall affect the validity of any bonds or debts incurred under existing laws, nor be construed to prohibit the General Assembly from authorizing any town or city to protect by additional appropriations of money or credit any railroad debt contracted prior to the adoption of this amendment." (G. S. p. 61.)

There are no other constitutional limitations of debt of any kind whatever, except the above, and that is a limitation common to almost all of the States.

§ 332. *DELAWARE.*

Revised Code of 1874 and session laws since to 1891, inclusive.

CONSTITUTIONAL LIMITATION.

There are no limitations on the debt contracting power of the State of Delaware, or any of the political subdivisions; in fact, there are no references to the matter whatsoever.

§ 333. *FLORIDA.*

McClellan's Digest, 1881, and session laws since to 1891, inclusive.

CONSTITUTIONAL LIMITATION.—ARTICLE XII.—TAXATION AND FINANCE.

Sec. 7. "The Legislature shall have power to provide for issuing of State bonds bearing interest, for securing the debt of the State, for the erection of State buildings, and for the support of State institutions, but the credit of the State shall not be pledged or loaned to any individual, company, corporation or association; nor shall the State become a joint owner or stockholder in any company, association or corporation. The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual." (McClellan, p. 64. Amended.)

§ 334. *GEORGIA.*

CONSTITUTION.—ARTICLE VII.—FINANCE, TAXATION, AND PUBLIC DEBT.

Sec. III., Par. 5186. "No debt shall be contracted by or on behalf of the State, except to supply casual deficiencies of revenue, to repel invasion, suppress insurrection and defend the State in time of war, or to pay the existing public debt; but the debt created to supply deficiencies in revenue shall not exceed, in the aggregate, two hundred thousand dollars."

Sec. VII., Par. 5191. 1. "The debt hereafter incurred by any county, municipal corporation, or political division of this State, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipalities or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of the property therein without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law: but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this constitution, may be authorized by law to increase, at any time, the amount of said debt, three per centum upon such assessed valuation."

Par. 5192. 2. "Any county, municipal corporation or political division of this State, which shall incur any bonded indebtedness under the provisions of this constitution, shall, at or before the time of so doing, provide for the assessment and collection of an annual tax, sufficient in amount to pay the principal and interest of said debt, within thirty years from the date of the incurring of said indebtedness." (Code, pp. 1317-8.)

There are other limitations which forbid the loaning of the credit of the State or of counties, etc., to any company (Art. VII., Secs. V. and VI.) which prohibit the State from assuming any debt of any political division, except the debt was contracted to repel invasion, etc. (Ibid. Sec. VIII.) Sec. X. provides that cities shall not incur any debt unless provision therefor shall have been made by the government, and Sec. XII. provides that the bonded debt of the State shall never be increased except to repel invasion, put down insurrection, or defend the State in time of war. (P. 1319, Code.)

§ 335. *IDAHO.*CONSTITUTION. — ARTICLE VIII. — PUBLIC INDEBTEDNESS
AND SUBSIDIES.

Sec. 1. "The Legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly, or in the aggregate, exclusive of the debt of the Territory at the date of its admission as a State, exceed the sum of one and one-half per centum upon the assessed value of the taxable property of the State, except in case of war, to repel an invasion or suppress insurrection, unless the same shall be authorized by law for some single object or work to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also for the payment and discharge of the principal of such debt or liability within twenty years of the time of the contracting thereof, and shall be irrevocable until the principal and interest thereon shall be paid and discharged; but no such law shall take effect until at the general election it shall have been submitted to the people, and shall have received a majority of all the votes cast for and against it at such election; and all moneys raised by the authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt thereby created, and such law shall be published in at least one newspaper in each county, or city and county, if one be published therein, throughout the State, for three months next preceding the election at which it is submitted to the people. The Legislature may, at any time after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same."

Sec. 3. "No county, city, town, township, board of education or school district, or other subdivision of the State, shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in that year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor un-

less, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void ; *Provided*, That this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the State." (Pp. 18 and 19, Official (pamphlet) Copy, 1889.)

§ 336. ILLINOIS.

CONSTITUTION.—ARTICLE IV.—PUBLIC MONEYS AND APPROPRIATIONS.

Sec. 18. "Each General Assembly shall provide for all the appropriations necessary for the ordinary and contingent expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, the aggregate amount of which shall not be increased without a vote of two-thirds of the members elected to each house, nor exceed the amount of revenue authorized by law to be raised in such time ; and all appropriations, general or special, requiring money to be paid out of the State Treasury, from funds belonging to the State, shall end with such fiscal quarter : *Provided*, The State may, to meet casual deficits or failures in revenues, contract debts, never to exceed in the aggregate \$250,000 ; and moneys thus borrowed shall be applied to the purpose for which they were obtained, or to pay the debt thus created, and to no other purpose ; and no other debt, except for the purpose of repelling invasion, suppressing insurrection, or defending the State in war (or payment of which the faith of the State shall be pledged), shall be contracted unless the law authorizing the same shall, at a general election, have been submitted to the people, and have received a majority of the votes cast for members of the General Assembly at such election. The General Assembly shall provide for the publication of

said law for three months at least before the vote of the people shall be taken upon the same ; and provision shall be made at the time for the payment of the interest annually as it shall accrue, by a tax levied for the purpose or from other sources of revenue, which law, providing for the payment of such interest by such tax, shall be irrevocable until such debt be paid ; *And provided, further*, That the law levying the tax shall be submitted to the people with the law authorizing the debt to be contracted." (R. S. p. 8.)

ARTICLE IX.—REVENUE.

Sec. 12. "No county, city, township, school district or other municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness. Any county, city, school district or other municipal corporation, incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same. This section shall not be construed to prevent any county, city, township, school district or other municipal corporation from issuing their bonds, in compliance with any vote of the people, which may have been had prior to the adoption of this constitution in pursuance of any law providing therefor." (Passed by Convention, May 13, 1875. R. S. pp. 24, 25.)

There are the usual constitutional prohibitions as to loaning money, credit, etc., like those of Alabama.

§ 337. INDIANA.

CONSTITUTION.—ARTICLE XIII.—MUNICIPAL DEBT.

Sec. 1. "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount, in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for the State and county taxes, previous to the incurring of such indebtedness ; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void ; *Provided*, That in time of war, foreign invasion, or other great calamity, or petition of a majority of the property owners, in number and value, within the limits of such corporation, the public authorities, in their discretion, may incur obligations necessary for the public protection and defence to such amount as may be requested in such petition." (Amendment, in lieu of four old sections. Adopted March 14, 1881.)

ARTICLE X.—FINANCE.

Sec. 5. "No law shall authorize any debt to be contracted on behalf of the State, except in the following cases, to meet casual deficits in the revenue and pay the interest of the State debt ; to repel invasion, suppress insurrection, or if hostilities be threatened, provide for the public defence."

§ 338. IOWA.

CONSTITUTION.—ARTICLE VII.

Sec. 2. "The State may contract debts to supply casual deficits or failures in revenues ; or to meet expenses not otherwise provided for ; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the General Assembly, or at different periods of time, shall never exceed the sum of \$250,000 ; and the money arising from

the creation of such debts shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever."

Sec. 5. "Except the debts hereinbefore specified in this article, no debt shall be hereafter contracted by, or on behalf of, this State, unless such debt shall be authorized by some law for some single work or object to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax, sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal of such debt, within twenty years from the time of the contracting thereof; but no such law shall take effect until at a general election it shall have been submitted to the people and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt created thereby; and such law shall be published in at least one newspaper in each county, if one is published therein, throughout the State, for three months preceding the election at which it is submitted to the people."

ARTICLE XI.

Sec. 3. "No county or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum of the value of the taxable property within such county or corporation—to be ascertained by the last State and county tax lists previous to the incurring of such indebtedness." (McClain's Ann'd Code, 1888, p. 1839.)

§ 339. KENTUCKY.

CONSTITUTION.—LEGISLATIVE DEPARTMENT.

Sec. 49. "The General Assembly may contract debts to meet casual deficits or failures in the revenue; but such debts, direct or contingent, singly or in the aggregate

gate, shall not at any time exceed \$500,000, and the moneys arising from loans creating such debts shall be applied only to the purpose or purposes for which they were obtained, or to repay such debts; *Provided*, The General Assembly may contract debts to repel invasion, suppress insurrection, or, if hostilities are threatened, provide for the public defence." (Page 46.)

Sec. 157. "No county, city, town, taxing district or municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same." (Page 54.)

Sec. 158. "The respective cities, towns, counties, taxing districts and municipalities shall not be authorized or permitted to incur indebtedness in the aggregate exceeding the following named maximum percentages on the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness, viz.: Cities of the first and second classes, and of the third class having a population exceeding 15,000, 10 per cent; cities of the third class, having a population of less than 15,000, and cities and towns of the fourth class, 5 per cent; cities and towns of the fifth and sixth classes, 3 per cent; and counties, taxing districts and other municipalities,—2 per cent: *Provided*, any city, town, county, taxing district or other municipality may contract an indebtedness in excess of such limitations, when the same has been authorized under laws in force prior to the adoption of this constitution, or when necessary for the completion of and payment for a public improvement undertaken and not completed and paid for at the time of the adoption of this constitution: *And provided*, *further*, If, at the time of the adoption of this constitution,

the aggregate indebtedness, bonded or floating, of any city, town, county, taxing district or other municipality, including that which it has been or may be authorized to contract as herein provided, shall exceed the limit herein prescribed, then no city or town shall be authorized or permitted to increase its indebtedness in an amount exceeding two per centum, and no such county, taxing district or other municipality, in an amount exceeding one per centum, in the aggregate, upon the value of the taxable property therein, to be ascertained as herein provided, until the aggregate of its indebtedness shall have been reduced below the limit herein fixed, and thereafter it shall not exceed the limit, unless in case of emergency the public health or safety should so require. Nothing herein shall prevent the issue of renewal bonds, or bonds to fund the floating indebtedness of any city, town, county, taxing district or other municipality." (Page 55.)

Sec. 159. "Whenever any county, city, town, taxing district or other municipality is authorized to contract an indebtedness, it shall be required, at the same time, to provide for the collection of an annual tax sufficient to pay the interest on said indebtedness and to create a sinking fund for the payment of the principal thereof, within not more than forty years from the time of contracting the same." (Page 56.)

Sec. 184. "The bond of the Commonwealth issued in favor of the Board of Education for the sum of \$1,327,000 shall constitute one bond of the Commonwealth in favor of the Board of Education, and this bond and the \$73,500 of the stock in the Bank of Kentucky, held by the Board of Education, and its proceeds, shall be held inviolate for the purpose of sustaining the system of common schools. The interest and dividends of said fund, together with any sum which may be produced by taxation or otherwise, for purposes of common-school education, shall be appropriated to the common schools and to no other purpose. No sum shall be raised or collected for education other than in common schools, until the question of taxation is submitted to the legal

voters, and the majority of the votes cast at said election shall be in favor of such taxation: *Provided*, The tax now imposed for educational purposes, and for the endowment and maintenance of the Agricultural and Mechanical College, shall remain until changed by law." (Page 65.)

§ 340. LOUISIANA.

CONSTITUTION.

Article 44. "The General Assembly shall have no power to contract or to authorize the contracting of any debt or liability, on behalf of the State, or to issue bonds or other evidences of indebtedness thereof, except for the purpose of repelling invasion or for the suppression of insurrection." (Voorhis, p. 175.)

Article 56. "The funds, credit, property or things of value of the State, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, association or corporation, public or private; nor shall the State, or any political corporation, purchase or subscribe to the capital or stock of any corporation or association whatever, or for any private enterprise. Nor shall the State, nor any political corporation thereof, assume the liabilities of any political, municipal, parochial, private or other corporation or association whatever; nor shall the State undertake to carry on the business of any such corporation or association, or become a part owner therein; *Provided*, The State, through the General Assembly, shall have power to grant the right of way through its public lands to any railroad or canal." (Voorhis, p. 178.)

There are the usual limitations like those of Alabama; but the limitations in Louisiana generally refer more to taxation and the taxing power than to limiting the debts and the debt-contracting power.

§ 341. MAINE.

CONSTITUTIONAL LIMITATIONS.—ARTICLE IX.—GENERAL PROVISIONS.

Sec. 14. "The credit of the State shall not be directly or indirectly loaned in any case. The Legislature shall not create any debt or debts, liability or liabilities, on behalf of the State, which shall singly or in aggregate, with previous debts and liabilities hereafter incurred at any one time, exceed \$300,000, except to suppress insurrection, to repel invasion, or for purposes of war; but this amendment shall not be construed to refer to any money that has been, or may be, deposited with this State by the government of the United States, or to any fund which the State shall hold in trust for any Indian tribe. R. S. 83, p. 51, Sec. 15 following, provides for an issue of bonds, payable within twenty-one years, interest not to exceed 6 per cent semi-annually, for the reimbursement of the municipal war debts of the various cities, towns, etc., of the State, and the total debt is limited to \$3,500,000." (Ibid. p. 52.)

ARTICLE XXII.

"Limitation of municipal indebtedness. No city or town shall hereafter create any debt or liability, which singly, or in the aggregate with previous debts or liabilities, shall exceed five per centum of the last regular valuation of said city or town; *Provided, however*, That the adoption of this article shall not be construed as applying to any fund received in trust by said city or town, nor to any loan for the purpose of renewing existing loans or for war, or to temporary loans to be paid out of money raised by taxation, during the year in which they are made." (Amendment of 1877, R. S. 83, p. 53.)

§ 342. MARYLAND.

CONSTITUTION.—ARTICLE III.—LEGISLATIVE DEPARTMENT.

Sec. 34. "No debt shall be hereafter contracted by the General Assembly, unless such debt shall be authorized

by law providing for the collection of an annual tax sufficient to pay the interest on such debt as it falls due, and also to discharge the principal thereof within fifteen years from the time of contracting the same; and the taxes laid for this purpose shall not be repealed or applied to any other object until the said debt and the interest thereon shall be fully discharged. The credit of the State shall not in any manner be given or loaned to or in aid of any individual, association or corporation; nor shall the General Assembly have the power in any mode to involve the State in the construction of works of internal improvement, nor in granting any aid thereto, which shall involve the faith or credit of the State; nor make any appropriation therefor, except in the aid of the construction of works of internal improvement, in the counties of St. Mary, Charles and Calvert, which have had no direct advantage from such works as have been heretofore aided by the State: *And provided*, That such aid, advances or appropriations shall not exceed in the aggregate the sum of five hundred thousand dollars. And they shall not use or appropriate the proceeds of the internal improvement companies or of the State tax, now levied, or which may be hereafter levied to pay off the public debt, to any other purpose until the interest and debt are fully paid, or the sinking fund shall be equal to the amount of the outstanding debt; but the General Assembly may, without levying a tax, borrow an amount never to exceed in fifty thousand dollars to meet temporary deficiencies in the Treasury, and may contract debts to any amount that may be necessary for the defence of the State."

Sec. 54. "No county of this State shall contract any debt, or obligation, in the construction of any railroad, canal, or other work of internal improvement, nor give or loan, its credit to, or in aid of any association, or corporation, unless authorized by an act of the General Assembly which shall be published for two months before the next election for members of the house of delegates in the newspaper published in such county, and shall also be approved by a majority of all the members of the General Assembly at its next session after said election."

§ 343. *MASSACHUSETTS.*

There are no constitutional limitations of debts for State, county or city purposes.

§ 344. *MICHIGAN.*

CONSTITUTION.—ARTICLE X.—COUNTIES.

Sec. 9. "The board of supervisors of any county may borrow or raise by tax one thousand dollars, for constructing or repairing public buildings, highways or bridges ; but no greater sum shall be borrowed or raised by tax for such purpose in any one year, unless authorized by a majority of the electors of such county voting thereon."

ARTICLE XIV.—FINANCE AND TAXATION.

Sec. 3. "The State may contract debts to meet deficits in revenue. Such debts shall not, in the aggregate, at any one time, exceed fifty thousand dollars. The moneys as raised shall be applied to the purposes for which they were obtained, or to the payment of the debts so contracted."

Sec. 4. "The State may contract debts to repel invasion, suppress insurrection, or defend the State in time of war. The money arising from the contracting of such debt shall be applied to the purposes for which it was raised, or to repay such debts."

Sec. 5. "No money shall be paid out of the treasury except in pursuance of appropriations made by law."

Sec. 6. "The credit of the State shall not be granted to or in aid of any person, association or corporation."

Sec. 7. "No script, certificate or other evidence of State indebtedness shall be issued, except for the redemption of stock previously issued, or for such debts as are expressly authorized in this constitution."

ARTICLE XV.—CORPORATIONS.

Sec. 13. "The Legislature shall provide for the incorporation and organization of cities and villages, and shall restrict their power of taxation, borrowing money, contracting debts and loaning their credit."

§ 345. MINNESOTA.

CONSTITUTION.—ARTICLE IX.—FINANCES OF THE STATE
AND BANKS AND BANKING.

Sec. 5. "Public debt may be contracted. For the purpose of defraying extraordinary expenditures, the State may contract public debts, but such debts shall never, in the aggregate, exceed two hundred and fifty thousand dollars; every such debt shall be authorized by law, for some single object, to be distinctly specified therein; and no such law shall take effect until it shall have been passed by the vote of two-thirds of the members of each branch of the Legislature, to be recorded by the yeas and nays on the journal of each house respectively; and every such law shall levy a tax annually sufficient to pay the annual interest of such debt; and also tax sufficient to pay the principal of such debt within ten years from the final passage of such law, and shall specially appropriate the proceeds of such taxes to the payment of such principal and interest; and such appropriation and taxes shall not be repealed, postponed or diminished until the principal and interest of such debt shall have been wholly paid. The State shall never contract any debts for works of internal improvement, or be a party in carrying on such works, except in cases where grants of land or other property shall have been made to the State, especially dedicated by the grant to specific purposes; and in such cases the State shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion."

Sec. 6. "Public debt, how contracted. All debts authorized by the preceding section shall be contracted by loan on State bonds of amounts of not less than five hundred dollars each on interest, payable within ten years after the final passage of the law authorizing such debt; and such bonds shall not be sold by the State under par. A correct registry of all such bonds shall be kept by the treasurer, in numerical order, so as always to exhibit the number and amount unpaid, and to whom severally made payable."

Sec. 7. "The State shall never contract any public

debt, unless in time of war, to repel invasion or suppress insurrection, except in the case and in the manner provided in the fifth and sixth sections of this article."

Sec. 15. "Municipal debts in aid of railroads. The Legislature shall not authorize any county, township, city or other municipal corporation to issue bonds or to become indebted in any manner to aid in the construction or equipment of any or all railroads to any amount that shall exceed five per centum of the value of the taxable property within such county, township, city or other municipal corporation; the amount of such taxable property to be ascertained and determined by the last assessment of said property made for the purpose of the State and county taxation previous to the incurring of such indebtedness."

Sec. 14. "Debts for public buildings. For the purpose of erecting and completing buildings for a hospital for the insane, a deaf, dumb, and blind asylum, and State prison, the Legislature may by law increase the public debt of the State to an amount not exceeding two hundred and fifty thousand dollars, in addition to the public debt already heretofore authorized by the constitution; and for that purpose may provide by law for issuing and negotiating the bonds of the State and appropriate the money only for the purpose aforesaid; which bonds shall be payable in not less than ten and not more than thirty years from the date of the same, at the option of the State."

§ 346. *MISSISSIPPI.*

CONSTITUTION.—ARTICLE IV. — LEGISLATIVE DEPARTMENT.

Sec. 80. "Provision shall be made by general laws to prevent the abuse by cities, towns and other municipal corporations of their powers of assessments, taxation, borrowing money and contracting debts." (A. C. p. 55.)

Sec. 88. "The Legislature shall pass general laws, under which local and private interests shall be provided for and protected, and under which cities and towns may be chartered and their charters amended, and under

which corporations may be created, organized, and their acts of incorporation altered ; and all such laws shall be subject to repeal or amendment." (A. C. p. 56.)

There are also the usual prohibitions as to loaning money or credit by the State, counties, cities, etc., to private corporations (Secs. 66, 183 and 258) and especially to railroads. The statute of limitations in civil causes shall not run against the State or any subdivision or municipal corporation thereof. (A. C. Sec. 104, p. 39.) This constitution is the new one adopted in 1890, and the laws are those which were passed to carry the new constitution into effect.

§ 347. MISSOURI.

Revised Statutes 1889, and Session Laws 1889, 1891 and 1892.

CONSTITUTIONAL LIMITATIONS. — ARTICLE IV. — LEGISLATIVE DEPARTMENT.

Sec. 44. "General Assembly not to contract debts except as herein. The General Assembly shall have no power to contract or to authorize the contracting of any debt or liability on behalf of the State, or to issue bonds or other evidence of indebtedness thereof, except in the following cases :

"First. In renewal of existing bonds, when they cannot be paid at maturity, out of the sinking fund or other resources.

"Second. On the occurring of an unforeseen emergency, or casual deficiency of the revenue, when the temporary liability incurred, upon the recommendation of the governor first had, shall not exceed the sum of \$250,000 for any one year, to be paid in not more than two years from and after its creation.

"Third. On the occurring of any unforeseen emergency, or casual deficiency of the revenue, when the temporary liability incurred, or to be incurred, shall exceed the sum of \$250,000 for any one year, the General Assembly may submit an act providing for the loan, or for the contracting of the liability, and containing a

provision for levying a tax sufficient to pay the interest and principal when they become due (the latter in not more than thirteen years from the date of its creation), to the qualified voters of the State, and when the act so submitted shall have been ratified by a two-thirds majority, at an election held for that purpose, due publication having been made of the provisions of the act for at least three months before such election, the act thus ratified shall be irrevocable until the debt thereby incurred shall be paid, principal and interest." (R. S. 1889, p. 73.)

ARTICLE IX.—COUNTIES, CITIES AND TOWNS.

Sec. 19. "Municipal indebtedness, payment of. The corporate authorities of any county, city or other municipal subdivision of this State, having more than 200,000 inhabitants, which has already exceeded the limit of indebtedness prescribed in Section twelve of Article X. of this constitution, may, in anticipation of the customary annual revenue thereof, appropriate, during any fiscal year, toward the general governmental expenses thereof, a sum not exceeding seven-eighths of the entire revenue applicable to general governmental purposes (exclusive of the payment of the bonded debt of such county, city or municipality) that was actually raised by taxation alone during the preceding fiscal year; but until such excess of indebtedness cease, no further bonded debt shall be incurred, except for the renewal of other bonds." (R. S. 1889, p. 94.)

ARTICLE X.—REVENUE AND TAXATION.

Sec. 12. "No county, city, town, township, school district, or other political corporation or subdivision of the State, shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be

allowed to be incurred to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness; *Provided*, That with such assent any county may be allowed to become indebted to a larger amount for the erection of a court-house or jail; *And provided, further*, that any county, city, town, township, school district, or other political corporation or subdivision of the State, incurring any indebtedness, requiring the assent of the voters as aforesaid, shall, before, or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest of such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof within twenty years from the time of contracting the same." (R. S. pp. 98, 99.)

§ 348. MONTANA.

CONSTITUTION.—ARTICLE XIII.—PUBLIC INDEBTEDNESS OF THE STATE.

Sec. 2. "The legislative assembly shall not in any manner create any debt except by law which shall be irrepealable until the indebtedness therein provided for shall have been fully paid or discharged; such law shall specify the purpose to which the funds so raised shall be applied, and provide for the levy of a tax sufficient to pay the interest on, and extinguish the principal of, such debt within the time limited by such law, for the payment thereof, but no debt or liability shall be created, which shall singly or in the aggregate, with any existing debt or liability, exceed the sum of \$100,000, except in case of war, to repel invasion or suppress insurrection, unless the law authorizing the same shall have been submitted to the people at a general election and shall have received a majority of the votes cast for and against it at such election."

OF THE COUNTIES.

Sec. 5. "No county shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five (5) per centum of the (value of the) taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by, or on behalf of, such county shall be void. No county shall incur any indebtedness or liability for any single purpose to an amount exceeding \$10,000 without the approval of the majority of the electors thereof, voting at an election to be provided by law."

OF CITIES, ETC.

Sec. 6. "No city, town, township, or school district shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding three (3) per centum of the value of the taxable property therein, to be ascertained by the last assessment for the State and county taxes previous to the incurring of such indebtedness, and all bonds and obligations in excess of such amount given by, or on behalf of, such city, town, township or school district shall be void; *Provided, however,* That the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality, which shall own or control said water supply, and devote the revenues derived therefrom to the payment of the debt." (Second Session Laws, 1891, pp. 45-47.)

§ 349. NEBRASKA.

CONSTITUTION. — ARTICLE XII. — STATE, COUNTY AND MUNICIPAL INDEBTEDNESS.

Sec. 1. "The State may, to meet casual deficits or

failure in the revenues, contract debts never to exceed in the aggregate one hundred thousand dollars ; and no greater indebtedness shall be incurred except for the purpose of repelling invasion, suppressing insurrection, or defending the State in war ; and provisions shall be made for the payment of the interest annually, as it shall accrue, by a tax levied for the purpose, or from other sources of revenue, which law providing for the payment of such interest by such tax shall be irrevocable until such debt is paid."

Sec. 2. "No city, county, town, precinct, municipality or other subdivision of the State shall ever make donation to any railroad or other work of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof at an election by authority of law : *Provided*, That such donations of a county with the donations of such subdivisions in the aggregate shall not exceed ten per cent of the assessed valuation of such county : *Provided, further*, That any city, or county, may, by a two-thirds vote, increase such indebtedness five per cent in addition to such ten per cent, and no bonds or evidences of indebtedness so issued shall be valid unless the same shall have endorsed thereon a certificate signed by the secretary and auditor of the State, showing that the same is issued pursuant to law."

Sec. 3. "The credit of the State shall never be given or loaned in aid of any individual, association, or corporation."

§ 350. NEVADA.

CONSTITUTION.—ARTICLE VIII.—MUNICIPAL AND OTHER CORPORATIONS.

Sec. 8. (161.) "The Legislature shall provide for the organization of cities and towns by general laws, and restrict their powers of taxation, assessment, borrowing money, contracting debts and loaning their credit, except for procuring supplies of water." (G. S. p. 12.)

ARTICLE IX.—FINANCE AND STATE DEBT.

Sec. 3. (166.) "For the purpose of enabling the State

to transact its business upon a cash basis, from its organization, the State may contract public debts; but such debts shall never, in the aggregate, exclusive of interest, exceed the sum of \$300,000, except for the purpose of defraying extraordinary expenses as hereinafter mentioned. Every such debt shall be authorized by law for some purpose or purposes, to be distinctly specified therein; and every such law shall provide for levying an annual tax sufficient to pay the interest semi-annually, and the principal within twenty years from the passage of such law, and shall specially appropriate the proceeds of such taxes to the payment of said principal and interest; and such appropriation shall not be repealed, nor the taxes be postponed or diminished until the principal and interest of said debts shall have been wholly paid. Every contract of indebtedness entered into or assumed by or on behalf of the State, when all its debts and liabilities amount to said sum before mentioned, shall be void and of no effect, except in cases of money borrowed to repel invasion, suppress insurrection, defend the State in time of war, or, if hostilities be threatened, provide for the public defence." (G. S. pp. 43, 85.)

§ 351. *NEW HAMPSHIRE.*

CONSTITUTION.—PART SECOND.—GENERAL COURT.—

ART. 5.

“And further, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this State and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defence of the government thereof; . . . and to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and residents within, the said State, and upon

all estates within the same, to be issued and disposed of by warrant, under the hand of the governor of this State for the time being, with the advice and consent of the council, for the public service in the necessary defence and support of the government of this State, and the protection and preservation of the subjects thereof, according to such acts as are or shall be in force within the same; *Provided*, That the general court shall not authorize any town to loan or give its money or credit, directly or indirectly, for the benefit of any corporation having for its object a dividend of profits, or in any way aid the same by taking its stock or bonds."

§ 352. NEW JERSEY.

CONSTITUTION.—ARTICLE I.—RIGHTS AND PRIVILEGES.

Sec. 6. Par. 4. "The Legislature shall not, in any manner, create any debt or debts, liability or liabilities, of the State, which shall singly, or in the aggregate, with any previous debts or liabilities at any time exceed \$100,000, except for purposes of war, or to repel invasion, or suppress insurrection, unless the same shall be authorized by a law for some single object or work, to be distinctly specified therein; which law shall provide the ways and means, exclusive of loans, to pay the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within thirty-five years from the time of the contracting thereof, and shall be irrevocable until such debt or liability, and the interest thereon, are fully paid and discharged; and no such law shall take effect until it shall, at a general election, have been submitted to the people and have received the sanction of a majority of all the votes cast for and against it at such election; and all money to be raised by the authority of such law shall be applied only to the specific object stated therein, and to the payment of the debt thereby created. This section shall not be construed to refer to any money that has been, or may be, deposited with this State by the government of the United States." (Revision, p. xxxvii.)

There are the usual prohibitions about loaning money or credit or making donations in aid of any individual or corporation. (Revision, p. xxxiv.)

§ 353. *NEW YORK.*

CONSTITUTION, 1895.—ARTICLE VII.—OF THE STATE.

Sec. 2. "The State may, to meet casual deficits, or failures in revenues, or for expenses not provided for, contract debts ; but such debts, direct and contingent, singly or in the aggregate, shall not, at any time, exceed one million of dollars ; and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained, or to repay the debt so contracted, and to no other purpose whatever."

Sec. 3. "In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection, or defend the State in war ; but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever."

Sec. 4. "Except the debts specified in sections two and three of this article, no debts shall be hereafter contracted by or on behalf of this State, unless such debt shall be authorized by a law, for some single work or object, to be distinctly specified therein ; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within eighteen years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it, at such election. In the final passage of such bill in either house of the Legislature, the question shall be taken by ayes and noes, to be duly entered on the journals thereof, and shall be : ' Shall this bill pass and ought the same to receive the sanction of the people ? '

“The Legislature may at any time, after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time, by law, forbid the contracting of any further debt or liability under such law; but the tax imposed by such act, in proportion to the debt and liability which may have been contracted, in pursuance of such law, shall remain in force and be irrepealable, and be annually collected, until the proceeds thereof shall have made the provision hereinbefore specified to pay and discharge the interest and principal of such debt and liability. The money arising from any loan or stock creating such debt or liability shall be applied to the work or object specified in the act authorizing such debt or liability; or for the repayment of such debt or liability, and for no other purpose whatever. No such law shall be submitted to be voted on within three months after its passage, or at any general election, when any other law, or any bill, or any amendment to the constitution shall be submitted to be voted for or against.”

This section is held to relate only to State finances and taxes, and not to municipal finances or taxes. *People v. Havemeyer*, 3 Hun, 97.

OF COUNTIES, CITIES, ETC. ARTICLE VII.

Sec. 9. “Neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking. This section shall not, however, prevent the Legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper. Nor shall it apply to any fund or property now held, or which may hereafter be held by the State for educational purposes.”

COUNTIES, CITIES AND TOWNS NOT TO GIVE OR LOAN MONEY OR CREDIT: LIMITATION OF INDEBTEDNESS.

Sec. 10. “No county, city, town or village shall hereafter give any money or property, or loan its money or

credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation ; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid or support of its poor as may be authorized by law. No county or city shall be allowed to become indebted for any purpose or in any manner to an amount which, including existing indebtedness, shall exceed ten per centum of the assessed valuation of the real estate of such county or city subject to taxation, as it appeared by the assessment-rolls of said county or city on the last assessment for State or county taxes prior to the incurring of such indebtedness ; and all indebtedness in excess of such limitation, except such as may now exist, shall be absolutely void, except as herein otherwise provided. No county or city whose present indebtedness exceeds ten per centum of the assessed valuation of its real estate subject to taxation, shall be allowed to become indebted in any further amount until such indebtedness shall be reduced within such limit. This section shall not be construed to prevent the issuing of certificates of indebtedness or revenue bonds issued in the anticipation of the collection of taxes for amounts actually contained in the taxes for the year when such certificates or revenue bonds are issued and payable out of such taxes.

“ Nor shall this section be construed to prevent the issue of bonds to provide for the supply of water ; but the term of the bonds issued to provide the supply of the water shall not exceed twenty years, and a sinking fund shall be created on the issuing of the said bonds for their redemption, by raising annually a sum which will produce an amount equal to the sum of the principal and interest of said bonds at their maturity. All certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes, which are not retired within five years after their date of issue, and bonds issued to

provide for the supply of water, and any debt hereafter incurred by any portion or part of a city, if there shall be any such debt, shall be included in ascertaining the power of the city to become otherwise indebted. Whenever hereafter the boundaries of any city shall become the same as those of a county, the power of the county to become indebted shall cease, but the debt of the county at that time existing shall not be included as part of the city debt. The amount hereafter to be raised by tax for county or city purposes, in any county containing a city of over one hundred thousand inhabitants, or any such city of this State, in addition to providing for the principal and interest of existing debt, shall not in the aggregate exceed in any one year two per centum of the assessed valuation of the real and personal estate of such county or city to be ascertained as prescribed in this section in respect to county or city debt.

ARTICLE XII.—ORGANIZATION OF CITIES AND VILLAGES.

SEC. 1. "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debt by such municipal corporations.¹

§ 354. NORTH CAROLINA.

CONSTITUTION.—ARTICLE V.—REVENUE AND TAXATION.

Sec. 4. "Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of

¹ See p. 421, note 5, for classification of cities and passage of special city laws.

such railroads as may be unfinished at the time of the adoption of the constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon." (Code, pp. 706, Vol. 3.)

ARTICLE VII.—MUNICIPAL CORPORATIONS.

Sec. 7. "No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied, or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." (Code, pp. 710, Vol. 2.)

ARTICLE VIII.

Sec. 4. "It shall be the duty of the Legislature to provide for the organization of cities, towns and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debt and loaning their credit so as to prevent abuses in assessments and in contracting debts by such municipal corporations." (Code, pp. 712-3, Vol. 2.)

§ 355. NORTH DAKOTA.

CONSTITUTION.—ARTICLE XII.—PUBLIC DEBT AND PUBLIC WORKS.—PUBLIC DEBT LIMITED.

Sec. 182. "The State may, to meet casual deficits or failure in the revenue, or in case of extraordinary emergencies, contract debts, but such debts shall never in the aggregate exceed the sum of two hundred thousand dollars, exclusive of what may be the debt of North Dakota at the time of the adoption of this constitution. Every such debt shall be authorized by law for certain purposes to be definitely mentioned therein, and every such law shall provide for levying an annual tax sufficient to pay the interest semi-annually, and the principal within thirty years from the passage of such law, and shall specially

appropriate the proceeds of such tax to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax discontinued until such debt, both principal and interest, shall have been fully paid. No debt in excess of the limit named shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the State in time of war, or to provide for public defence in case of threatened hostilities, but the issuing of new bonds to refund existing indebtedness shall not be construed to be any part or portion of said two hundred thousand dollars." (Pp. 115-116.)

COUNTY INDEBTEDNESS LIMITED.

Sec. 183. "The debt of any county, township, city, town, school district or any other political subdivision, shall never exceed five per centum upon the assessed value of the taxable property therein; *Provided*, That any incorporated city may, by a two-thirds vote, increase such indebtedness three per centum on such assessed value beyond said five per cent limit. In estimating the indebtedness which a city, county, township, school district or any other political subdivision may incur the entire amount of existing indebtedness, whether contracted prior or subsequent to the adoption of this constitution, shall be included: *Provided, further*, that any incorporated city may become indebted in any amount not exceeding four per centum on such assessed value without regard to the existing indebtedness of such city, for the purpose of constructing or purchasing water works for furnishing a supply of water to the inhabitants of such city, or for the purpose of constructing sewers, and for no other purpose whatever. All bonds or obligations in excess of the amount of indebtedness permitted by this constitution, given by any city, county, township, town, school district, or any other political subdivision, shall be void." (Page 116.)

Sec. 184 requires a tax to be levied on or before the time of incurring the debt.

BONDS OF STATE OR COUNTY.—WHEN INVALID.

Sec. 187. “No bond or evidence of indebtedness of the State shall be valid without a debt certificate endorsed upon it signed by the auditor and secretary of state. No bond, etc., of any county, city, etc., shall be valid without a similar certificate of debt signed by the county auditor or other officer authorized by law to sign such certificate.” (Page. 117.)

§ 356. OHIO,

CONSTITUTION.—ARTICLE VIII.—PUBLIC DEBT AND
PUBLIC WORKS.

Sec. 1. “The State may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the General Assembly, or at different periods of time, shall never exceed seven hundred and fifty thousand dollars; and the money, arising from the creation of such debts, shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

Sec. 2. “In addition to the above limited power, the State may contract debts to repel invasion, suppress insurrection, defend the State in war, or to redeem the present outstanding indebtedness of the State; but the money, arising from the contracting of such debts, shall be applied to the purpose for which it is raised, or to repay such debts, and to no other purpose whatever; and all debts, incurred to redeem the present outstanding indebtedness of the State, shall be so contracted as to be payable by the sinking fund hereinafter provided for, as the same shall accumulate.”

Sec. 3. “Except the debts above specified in sections one and two of this article, no debt whatever shall hereafter be created by or on behalf of the State.”

Sec. 5. “The State shall never assume the debts of

any county, city, town or township, or of any corporation whatever, unless such debt shall have been created to repel invasion, suppress insurrection, or defend the State in war."

Sec. 7. "The faith of the State being pledged for the payment of its public debt, in order to provide therefor, there shall be created a sinking fund, which shall be sufficient to pay the accruing interest on such debt, and, annually, to reduce the principal thereof, by a sum not less than one hundred thousand dollars, increased yearly, and each and every year, by compounding, at the rate of six per cent per annum. The said sinking fund shall consist of the net annual income of the public works and stocks owned by the State, of any other funds or resources that are, or may be, provided by law, and of such further sum, to be raised by taxation, as may be required for the purposes aforesaid."

ARTICLE XII.—FINANCE AND TAXATION.

Sec. 6. "The State shall never contract any debt for purposes of internal improvement."

ARTICLE XIII.—CORPORATIONS.

Sec. 6. "The General Assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

§ 357. OREGON.

CONSTITUTION.—ARTICLE XI.—CORPORATIONS AND INTERNAL IMPROVEMENTS.

Sec. 5. "Acts of legislative assembly incorporating towns and cities shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit."

Sec. 10. "No county shall create any debts or liabilities, which shall singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insur-

rection or repel invasion ; but the debts of any county at the time this constitution takes effect shall be disregarded in estimating the sum to which such county is limited.”

§ 358. *PENNSYLVANIA.*

CONSTITUTION.—ARTICLE IX.—OF TAXATION AND
FINANCE.

OF THE STATE.

Sec. 4. “ No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or to pay existing debt ; and the debt created to supply deficiencies in revenue, shall never exceed, in the aggregate, at any one time, one million of dollars.”

Sec. 11 provides for an annual sinking fund levy, sufficient to pay the yearly interest and not less than \$250,000 of the present State debt.

OF COUNTIES, CITIES, ETC.

Sec. 8. “ The debt of any county, city, borough, township, school district or other municipality or incorporated district, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein, nor shall any such municipality or district incur any new debt, or increase its indebtedness, to an amount exceeding two per centum upon such assessed valuation of property, without the assent of the electors thereof, at a public election, in such manner as shall be provided by law ; but any city, the debt of which now exceeds seven per centum of such assessed valuation, may be authorized by law to increase the same three per centum, in the aggregate, at any one time, upon such valuation.”

Sec. 10. “ Any county, township, school district or other municipality, incurring any indebtedness, shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest, and also the principal thereof within thirty years.” (Digest, p. 41-2.)

ARTICLE XV.

Sec. 2. "No debt shall be contracted or liability incurred by any municipal commission, except in pursuance of an appropriation previously made therefor by the municipal government." (Digest, p. 44.)

There are the usual constitutional limitations in regard to loaning money or credit to private corporations, etc., such as those of Alabama.

SUPPLEMENTAL CONSTITUTIONAL LIMITATIONS.

Sec. 5. "All laws authorizing the borrowing of money by and on behalf of the State, shall specify the purposes for which the money is to be used; and the money so borrowed shall be used for the purpose specified, and no other."

Sec. 6. "The credit of the commonwealth shall not be pledged or loaned to any individual, company, corporation or association; nor shall the commonwealth become a joint owner or stockholder in any company, association or corporation."

Sec. 7. "The General Assembly shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual."

Sec. 9. "The commonwealth shall not assume the debt, or any part thereof, of any city, county, borough or township, unless such debt shall have been contracted to enable the State to repel invasion, suppress domestic insurrection, defend itself in time of war, or to assist the State in the discharge of any portion of its present indebtedness.

Sec. 11. "To provide for the payment of the present State debt, and any additional debt contracted as aforesaid, the General Assembly shall continue and maintain the sinking fund, sufficient to pay the accruing interest on such debt, and annually to reduce the principal thereof, by a sum not less than two hundred and fifty

thousand dollars ; the said sinking fund shall consist of the proceeds of the sales of the public works or any part thereof, and of the income or proceeds of the sale of any stocks owned by the commonwealth, together with other funds and resources that may be designated by law, and shall be increased from time to time, by assigning to it any part of the taxes or other revenues of the State not required for the ordinary and current expenses of government ; and unless in case of war, invasion or insurrection, no part of the said sinking fund shall be used or applied otherwise than in the extinguishment of the public debt." (Digest, pp. 41-2.)

§ 359. *RHODE ISLAND.*

CONSTITUTION. — ARTICLE IV. — OF THE LEGISLATIVE POWER.

Sec. 13. "The General Assembly shall have no power hereafter, without the express consent of the people, to incur State debts to an amount exceeding \$50,000, except in time of war, or in case of insurrection or invasion ; nor shall they in any case, without such consent, pledge the faith of the State for the payment of the obligations of others. This section shall not be construed to refer to any money that may be deposited with this State by the government of the United States." (P. S. 1882, p. 25.)

ARTICLE XIV.

Sec. 2. "All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the State as if this constitution had not been adopted." (P. S. 1882, p. 32.)

There is also a provision which requires the two-thirds assent of the members elected to each house of the General Assembly to every bill appropriating the public money for local or private purposes. (Art. IV. Sec. 14, p. 25.)

§ 360. *SOUTH CAROLINA.*

CONSTITUTION.—ARTICLE IX.—FINANCE AND TAXATION.

Sec. 7. "For the purpose of defraying extraordinary expenditures, the State may contract public debts; but such debts shall be authorized by law for some single object, to be distinctly specified therein; and no such law shall take effect until it shall have been passed by a vote of two-thirds of the members of each branch of the General Assembly, to be recorded by yeas and nays on the journals of each House respectively; and every such law shall levy a tax annually sufficient to pay the annual interest on such debt." (Page xlii.)

Sec. 9. "The General Assembly shall provide for the incorporation and organization of cities and towns, and shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit."

Sec. 10. "No scrip, certificate, or other evidence of State indebtedness shall be issued, except for the redemption of stock, bonds, or other evidences of indebtedness previously issued, or for such debts as are expressly authorized in this constitution."

Sec. 14. "Any debt contracted by the State shall be by loan on State bonds of amounts not less than fifty dollars each, on interest, payable within twenty years after the final passage of the law authorizing such debt. A correct registry of all bonds shall be kept by the treasurer in numerical order so as always to exhibit the number and amount unpaid, and to whom severally made payable." (G. S. p. xliii.)

AMENDMENT.—ARTICLE XVI.

"To the end that the public debt of South Carolina may not hereafter be increased, without the due consideration and free consent of the people of the State, the General Assembly is hereby forbidden to create any further debt or obligation, either by the loan of the credit of the State, by guaranty, endorsement or otherwise, except for the ordinary and current business of the

State, without first submitting the question as to the creation of any such new debt, guarantee, endorsement or loan of its credit to the people of this State at a general State election; and unless two-thirds of the qualified voters of this State, voting on the question, shall be in favor of a further debt, guaranty, endorsement, or loan of its credit, none such shall be created or made." (G. S. p. xlvihi.)

§ 361. *SOUTH DAKOTA.*

CONSTITUTION.—ARTICLE XIII.—PUBLIC INDEBTEDNESS.

Sec. 2. "For the purpose of defraying extraordinary expenses and making public improvements, or to meet casual deficits or failure in revenue, the State may contract debts never to exceed, with previous debts in the aggregate, \$500,000, and no greater indebtedness shall be incurred except for the purpose of repelling invasion, suppressing insurrection, or defending the State or the United States in war, and provisions shall be made by law for the payment of the interest annually, and the principal when due, by tax levied for the purpose, or from other sources of revenue; which law providing for the payment of such interest and principal by such tax or otherwise shall be irrevocable until such debt is paid; *Provided, however,* The State of South Dakota shall have the power to refund the territorial debt assumed by the State of South Dakota, by bonds of the State of South Dakota." (S. L. 91, p. xlii.)

Sec. 3. "That the indebtedness of the State of South Dakota, limited by Sec. 2 of this article, shall be in addition to the debt of the Territory of Dakota assumed by and agreed to be paid to South Dakota."

Sec. 4. "The debt of any county, city, town, school district or other subdivision, shall never exceed five per centum upon the assessed value of the taxable property therein. In estimating the amount of indebtedness which a municipality or subdivision may incur, the amount of indebtedness contracted prior to the adoption of this constitution shall be included."

Sec. 5. "Any city, county, town, school district or any other subdivision incurring indebtedness shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof when due, and all laws or ordinances providing for the payment of the interest or principal of any debt shall be irrevocable until such debt be paid." (S. L. 91, p. xlii.)

Section 1, Article X., provides that the Legislature shall pass general laws for the organization and classification of municipal corporations, which classes shall not exceed four in number; and it shall also restrict the power of such corporations to borrow money and contract debts, etc., so as to prevent the abuse of such power. (Ibid. p. xxxix.)

§ 362. *TENNESSEE.*

CONSTITUTION.—ARTICLE II.—DISTRIBUTION OF POWERS.

Sec. 29. "The General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation. But the credit of no county, city or town shall be given or loaned to, or in aid of, any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation, except upon a like election and the assent of a like majority. But the counties of Grainger, Hawkins, Hancock, Union, Campbell, Scott, Morgan, Grundy, Sumner, Smith, Fentress, Van Buren, White, Putnam, Overton, Jackson, Cumberland, Anderson, Henderson, Wayne, Marshall, Boone, Coffee, Macon and the new county herein authorized to be estab-

lished out of fractions of Sumner, Macon and Smith counties and Roane, shall be excepted out of the provisions of this section, so far that the assent of a majority of the qualified voters of either of said counties voting on the question shall be sufficient, when the credit of such county is given or loaned to any person, association or corporation; *Provided*, That the exception of the counties above named shall not be in force beyond the year 1880, and after that period they shall be subject to the three-fourths majority applicable to the other counties of the State."

Sec. 33. "No bonds of the State shall be issued to any railroad company which, at the time of its application for the same, shall be in default in paying the interest upon the State bonds previously loaned to it, or that shall hereafter and before such application, sell or absolutely dispose of any State bonds loaned to it, for less than par." (Code, p. lxxxi.)

There are also the usual restrictions about loaning the money or credit of the State for private enterprises. (Ibid. Sec. 32.)

§ 363. TERRITORIES.

LIMIT PRESCRIBED BY THE ACT OF CONGRESS.—JULY 30, A. D. 1886.—APPLICABLE TO ALASKA, ARIZONA, NEW MEXICO AND UTAH TERRITORIES.

Sec. 1888. "No legislative assembly of a territory shall, in any instance or under any pretext, exceed the amount appropriated by Congress for its annual expenses.

"*Be it enacted*, etc., that the Legislature of the territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say :

Granting divorces.

Changing the name of persons or places.

Laying out, opening, altering, and working roads or highways.

Vacating roads, town-plats, streets, alleys and public grounds.

Locating or changing county seats.
Regulating township and county affairs.
Regulating the practice in courts of justice.
Regulating the jurisdiction and duties of justices of the peace, police magistrates, and constables.
Providing for changes in venue in civil and criminal cases.
Incorporating cities, towns or villages, or changing or amending the charter of any town, city or village.
The punishment of crimes or misdemeanors.
For the assessment and collection of taxes for territorial, county, township, or road purposes.
Summoning and impanelling grand or petit jurors.
Providing for the management of common schools.
Regulating the rate of interest on money.
The opening and conducting of any election or designating the place of voting.
The sale or mortgage of real estate belonging to minors or others under disability.
The protection of game or fish.
Chartering or licensing ferries and toll bridges.
Remitting fines, penalties or forfeitures.
Creating, increasing or decreasing fees, percentage or allowances of public officers during the term for which said officers are elected and appointed.
Changing the law of descent.
Granting to any corporation, association or individual the right to lay down railroad tracks, or amending existing charters for such purpose.
Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.
In all other cases where a general law can be made applicable, no special shall be enacted in any of the territories of the United States by the territorial Legislature thereof."

Sec. 2. "That no territory of the United States, now or hereafter to be organized, or any political or municipal corporation or subdivision of any such territory, shall hereafter make any subscription to the capital stock

of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to, or use it for benefit of, any such company or association, or borrow money for the use of any such company or association."

Sec. 3. "That no law of any territorial Legislature shall authorize any debt to be contracted by or on behalf of such territory except in the following cases: To meet a casual deficit in the revenue, to pay the interest upon the territorial debt, to suppress insurrection, or to provide for the public defence, except that in addition to any indebtedness created for such purposes, the Legislature may authorize a loan for the erection of penal, charitable or educational institutions for such territory, if the total indebtedness of the territory is not thereby made to exceed one per centum upon the assessed value of the taxable property in such territory as shown by the last general assessment for taxation. And nothing in this act shall be construed to prohibit the refunding of any existing indebtedness of such territory or of any political or municipal corporation, county or other subdivision therein."

Sec. 4. "That no political or municipal corporation, county or other subdivision, in any of the territories of the United States, shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county or subdivision, to be ascertained by the last assessment for the territorial and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by such corporation shall be void: That nothing in this act contained shall be so construed as to affect the validity of any act of any territorial Legislature heretofore enacted or of any obligations existing or contracted thereunder, not to preclude the issuing of bonds already contracted for in pursuance of express provisions of law; nor to prevent any territorial Legislature from legalizing the act of any county, municipal corporation, or subdivi-

vision of any territory as to any bonds heretofore issued or contracted to be issued."

Sec. 5. "The legislative assemblies of the several territories shall not grant private charters or special privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate, for mining, manufacturing, and other industrial pursuits, and for conducting the business of insurance, banks of discount and deposit (but not to issue), loan, trust and guarantee associations, and for the construction or operation of railroads, wagon roads, irrigating ditches and the colonization and improvement of lands in connection herewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable or scientific association."

Sec. 6. "That nothing in this act contained shall be construed to abridge the power of Congress to annul any law passed by a territorial Legislature, or to modify any existing law of Congress requiring in any case that the laws of any territory shall be submitted to Congress."

Sec. 7. "That all acts and parts of acts hereafter passed by any territorial Legislature in conflict with the provisions of this act shall be null and void."

§ 361. TEXAS.

CONSTITUTION.—ARTICLE XI.—MUNICIPAL CORPORATIONS.

Sec. 4. "Cities and towns having a population of ten thousand inhabitants or less, may be chartered alone by general law. They may levy, assess and collect an annual tax to defray the current expenses of their local government, but such tax shall never exceed, for any one year, one-fourth of one per cent, and shall be collected only in current money. And all license and occupation tax levied, and all fines, forfeitures, penalties and other dues accruing to cities and towns, shall be collected only in current money."

Sec. 5.¹ "Cities having more than ten thousand in-

¹ See sec. 61 for the construction of this section.

habitants may have their charters granted or amended by special act of Legislature, and may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful, for any one year, which shall exceed two and one-half per cent of the taxable property of such city ; and no debt shall ever be created by any city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon."

Sec. 7. "All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized, upon a vote of two-thirds of the taxpayers therein (to be ascertained as may be provided by law), to levy and collect such tax for construction of sea-walls, breakwaters or sanitary purposes, as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund ; and the condemnation of the right of way for the erection of such works shall be fully provided for."

§ 365. VERMONT.

There are no constitutional limitations ; the constitution only provides that the Legislature shall have power to constitute counties, towns, etc.

§ 366. VIRGINIA.

CONSTITUTION.—ARTICLE X.—TAXATION AND FINANCE.

Sec. 7. "No debt shall be contracted by this State, except to meet casual deficits in the revenue to redeem previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war."

Sec. 8. "The General Assembly shall provide, by law, a sinking fund, to be applied solely to the payment and

extinguishment of the principal of the State debt, which sinking fund shall be continued until the extinguishment of such State debt; and every law hereafter enacted by the General Assembly, creating a debt or authorizing a loan, shall provide a sinking fund for the payment of the same."

Sec. 9. "The unfunded debt shall not be funded or redeemed at a value exceeding that established by law at the time said debt was contracted, nor shall any discrimination hereafter be made in paying the interest on State bonds, which shall give a higher actual value to bonds held in foreign counties, over the class of bonds held in this county." (R. C. 1887, pp. 47-8.)

The State is also forbidden to subscribe to or become interested in the stock of any company, etc., or be interested in any work of internal improvement or assume the indebtedness of any county, borough, etc. (Ibid. p. 48.)

There are no constitutional limitations on the debt of any county, city, etc. They are to be found in the charters of the cities.

§ 367. WASHINGTON.

CONSTITUTION. — ARTICLE VIII.—STATE, COUNTY AND MUNICIPAL INDEBTEDNESS.

Sec. 1. "The State may, to meet casual deficits or failures in revenues, or for expenses not provided for, contract debts, but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed four hundred thousand dollars (\$400,000), and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained, or to repay the debts so contracted, and to no other purpose whatever."

Sec. 2. "In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection, or to defend the State in war, but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, and to no other purpose whatever."

Sec. 3. "Except the debts specified in sections one and two of this article, no debts shall hereafter be contracted by, or on behalf of, this State, unless such debt shall be authorized by law for some single work or object to be distinctly specified therein, which law shall provide ways and means exclusive of loans, for the payment of the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast in its favor. The State and no subdivision thereof can aid or loan its credit for, or become interested in, a private enterprise.

No county, city, town, school district or other municipal corporation shall, for any purpose, become indebted in any manner to an amount exceeding $1\frac{1}{2}$ per centum of the taxable property in such county, city, town, school district or other municipal corporation, without the assent of three-fifths of the voters therein, voting at an election to be held for that purpose, nor in any case requiring such assent shall the total indebtedness at any time exceed five per centum of the value of taxable property therein, to be ascertained by the last assessment for State and county purposes, previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes; *Provided*, That no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district or other municipal purposes: *Provided, further*, That any city or town, with such assent, may be allowed to become indebted to a larger amount but not to exceed five per centum additional, for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, lights and sewers shall be owned and controlled by the municipality.

§ 368. WEST VIRGINIA.

CONSTITUTION.—ARTICLE X.—TAXATION AND FINANCE.

Sec. 4. "No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war: but the payment of any liability, other than for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years."

Sec. 5. "The power of taxation of the Legislature shall extend to provisions for the payment of the State debts, and interest thereon, the support of free schools, and the payment of the annual estimated expenses of the State; but whenever any deficiency in the revenue shall exist in any year, it shall, at the regular session thereof held next after the deficiency occurs, levy a tax for the ensuing year, sufficient, with the other sources of income, to meet such deficiency, as well as the estimated expenses of such year."

Sec. 6. "The credit of the State shall not be granted to, or in aid of, any county, city, township, corporation or person; nor shall the State ever assume, or become responsible for, the debts or liabilities of any county, city, town, township, corporation or person: nor shall the State ever hereafter become a joint owner, or stockholder, in any company or association in this State or elsewhere, formed for any purpose whatever."

Sec. 7. "County authorities shall never assess taxes, in any one year, the aggregate of which shall exceed ninety-five cents per one hundred dollars valuation, except for the support of free schools: payment of indebtedness existing at the time of the adoption of this constitution; and for the payment of any indebtedness with the interest thereon, created under the succeeding section, unless such assessment, with all questions involving the increase of such aggregate, shall have been submitted to a vote of the people of the county, and have received three-fifths of all the votes cast for and against it."

Sec. 8. "No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of taxable property therein to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax, sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding thirty-four years: *Provided*, That no debt shall be contracted under this section, unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same."

Sec. 9. "The Legislature may, by law, authorize the corporate authorities of cities, towns and villages for corporate purposes, to assess and collect taxes; but such taxes shall be uniform, with respect to persons and property within the jurisdiction of the authority imposing the same."

§ 369. WISCONSIN.

CONSTITUTION.—ARTICLE VIII.—FINANCE.

Sec. 1. "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the Legislature shall prescribe."

Sec. 2. "No money shall be paid out of the Treasury; except in pursuance of an appropriation by law."

Sec. 3. "The credit of State shall never be given or loaned in aid of any individual, association or corporation."

Sec. 4. "The State shall never contract any public debt, except in the cases and manner herein provided."

Sec. 5. "The Legislature shall provide for an annual tax sufficient to defray the estimated expenses of the State for each year; and whenever the expenses of any

year shall exceed the income, the Legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of such ensuing year."

Sec. 7. "The Legislature may also borrow money to repel invasion, suppress insurrection, or defend the State in time of war; but the money thus raised shall be applied exclusively to the object for which the loan was authorized, or to the repayment of the debt thereby created."

Sec. 8. "On the passage in either house of the Legislature of any law which imposes, continues or renews a tax, or creates a debt, or charge, or makes, continues, or renews an appropriation of public, or trust money, or releases, discharges, or commutes a claim, or demand of the State, the question shall be taken by yeas and nays, which shall be duly entered on the journal; and three-fifths of all the members elected to such house shall, in all such cases, be required to constitute a quorum therein."

Sec. 9. "No scrip, certificate, or other evidence of State debt, whatsoever, shall be issued, except for such debts as are authorized by the 6th and 7th sections of this article."

Sec. 10. "The State shall never contract any debt for works of internal improvement, or be a party in carrying on such works, but whenever grants of land or other property shall have been made to the State, especially dedicated by the grant to particular works of internal improvement, the State may carry on such particular works, and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion."

§ 370. WYOMING.

CONSTITUTION.—ARTICLE XVI.—PUBLIC INDEBTEDNESS.

Sec. 1. "The State of Wyoming shall not, in any manner, create any indebtedness exceeding one per centum on the assessed value of the taxable property in

the State, as shown by the last general assessment for taxation, preceding; except to suppress insurrection or to provide for the public defence."

Sec. 2. "No debt in excess of the taxes for the current year shall in any manner be created in the State of Wyoming, unless the proposition to create such debt shall have been submitted to a vote of the people and by them approved; except to suppress insurrection or to provide for the public defence."

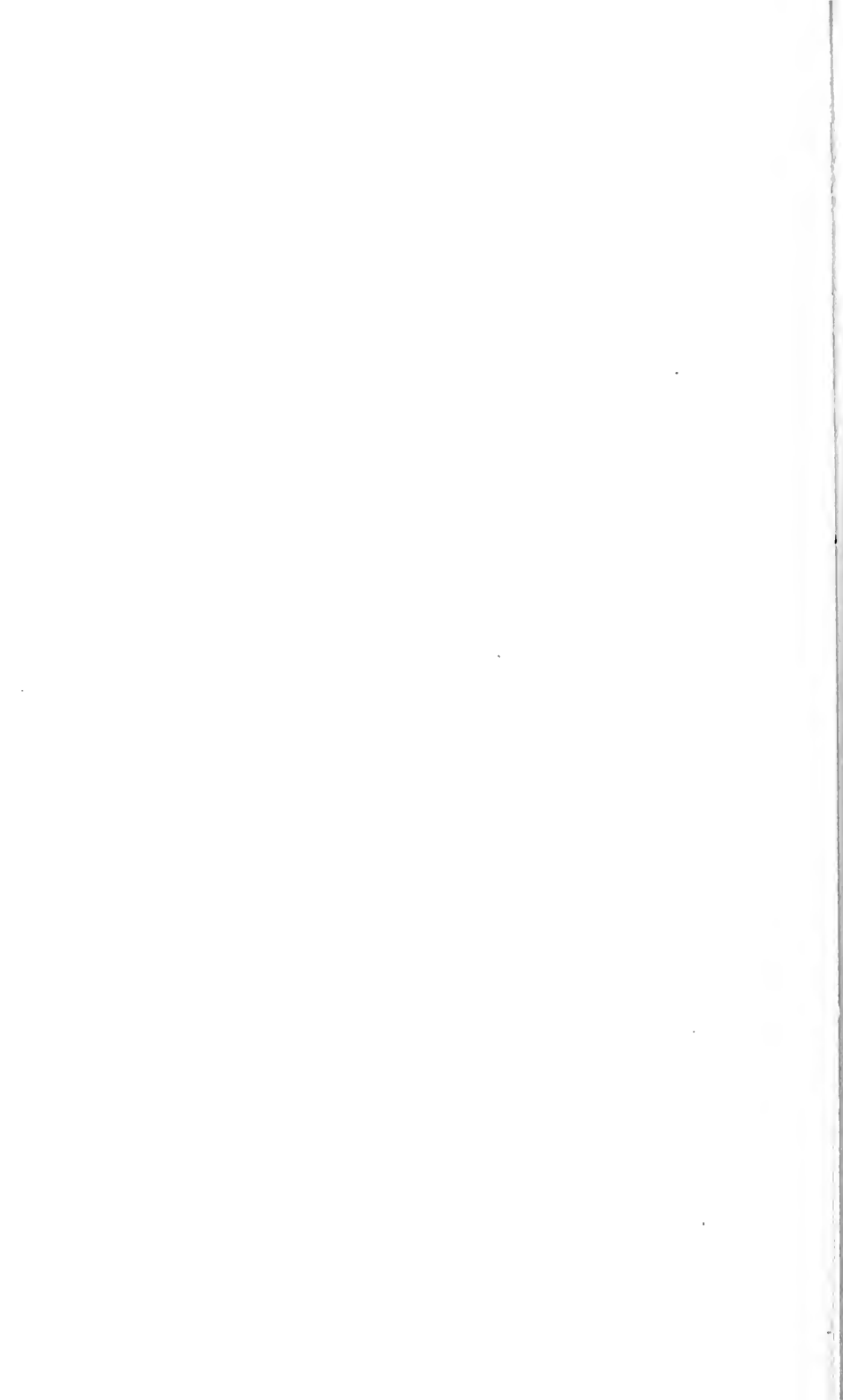
Sec. 3. "No county in the State of Wyoming shall in any manner create any indebtedness, exceeding two per centum on the assessed value of taxable property in such county, as shown by the last general assessment preceding; *Provided, however*, That any county, city, town, village or other subdivision thereof in the State of Wyoming, may bond its public debt existing at the time of the adoption of this constitution, in any sum not exceeding four per centum on the assessed value of the taxable property in such county, city, town, village or other subdivision, as shown by the last general assessment for taxation."

Sec. 4. "No debt in excess of the taxes for the current year shall, in any manner, be created by any county or subdivision thereof, or any city, town or village, or any subdivision thereof in the State of Wyoming, unless the proposition to create such debt shall have been submitted to a vote of the people thereof and by them approved."

Sec. 5. "No city, town or village, or any subdivision thereof, or any subdivision of any county of the State of Wyoming, shall, in any manner, create any indebtedness exceeding two per centum on the assessed value of the taxable property therein; *Provided, however*, That any city, town or village may be authorized to create an additional indebtedness, not exceeding four per centum on the assessed value of the taxable property therein as shown by the last preceding general assessment, for the purpose of building sewerage therein. Debts contracted for supplying water to such city or town are excepted from the operation of this section."

Sec. 8. "No bond or evidence of indebtedness of the

State shall be valid unless the same shall have endorsed thereon a certificate signed by the auditor and secretary of state that the bond or evidence of debt is issued pursuant to law and within the debt limit. No bond or evidence of debt of any county, or bond of any township or other political subdivision, shall be valid unless the same shall have endorsed thereon a certificate signed by the county auditor or other officer authorized by law to sign such certificate, stating that said bond or evidence of debt is issued pursuant to law and is within the debt limit."



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